Summary: The petitioner sought a writ of habeas corpus pursuant to 28 U.S.C. 2254, asserting five claims of ineffective assistance of counsel, a violation of his Sixth Amendment public trial rights, and a violation of the Eighth Amendment's proscription of cruel and unusual punishment. The magistrate judge issued a report recommending the dismissal of the habeas petition. However, recognizing that three claims were debatable, he recommended that a certificate of appealability be issued with respect to Sixth Amendment claim along with two of the claims of ineffective assistance of counsel.

Case Name: Garcia v. Bertsch
Case Number: 3-04-cv-75
Docket Number: 34
Date Filed: 9/12/05
Nature of Suit: 530

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Barry C. Garcia, Petitioner, vs. Leann K. Bertsch, Director of the North Dakota Department of Corrections, Respondent.	)	**REPORT AND RECOMMENDATION FOR DISMISSAL OF PETITION FOR HABEAS CORPUS** Case No. A3-04-075

Magistrate Judge Charles S. Miller, Jr. makes the following report and recommendation regarding Barry C. Garcia's petition for habeas corpus filed pursuant to 28 U.S.C. § 2254:

I. BACKGROUND

A. Case background

Petitioner Barry C. Garcia ["Garcia"] was charged and convicted of the killing of Cherryl Tendeland in West Fargo, North Dakota on November 15, 1995. Tendeland was sitting in the front-

passenger seat of a vehicle being driven by her husband Pat Tendeland when a person approached the vehicle and fired a sawed-off shotgun through the front-passenger window. Cherryl Tendeland died a short while later. Pat Tendeland was also wounded. Connie Guler, a friend who was seated in the backseat, was not injured.

The State of North Dakota arrested Garcia and three others for the crime. At the time, Garcia was sixteen years old, but was prosecuted as an adult because authorities believed him to be the shooter. The following summary of the evidence comes from the opinion of the North Dakota Supreme Court in Garcia v. State, 1997 ND 60, 561 N.W.2d 599 ["Garcia I"]. Based upon a review of the trial transcripts, the court's summary is a fair and accurate and characterization of the evidence:

> [¶2] In a residential neighborhood in West Fargo on November 15, 1995, near 10:30 p.m., a short, young man walked up to the front passenger door of a car where Pat and Cherryl Tendeland were in the front seat, and Connie Guler, their friend, was in the backseat. From close to nine inches, the young man fired a sawed-off shotgun through the front passenger window, wounding Pat and killing Cherryl.
>
> [¶3] Police later arrested Garcia with three other young men. The State charged Garcia, then age 16, with murder, attempted robbery, aggravated assault, and a street-gang crime in juvenile court. Garcia was transferred to adult court for trial.
>
> [¶4] During the trial, after the State's case-in-chief, the trial court granted both the State's motion to dismiss the street-gang charge and Garcia's motion for acquittal of the attempted robbery charge. The jury found Garcia guilty of murder, a class AA felony, and aggravated assault, a class C felony. The trial court sentenced Garcia to life imprisonment without parole on the murder conviction, and to a concurrent five years imprisonment on the aggravated assault conviction. Garcia appealed.
>
> [¶5] During the evening of November 15, 1995, juveniles Jaime Guerrero, Juan Guerrero, Michael Charbonneau, Ray Martinez, Angel Esparza, and Garcia drove around Fargo-Moorhead in a brown, 1975, Minnesota-licensed, Ford sedan owned by Juan Guerrero's mother. The young men took along 10 to 15 red and green

shotgun shells and a sawed-off shotgun owned by the Skyline Piru Bloods, a street gang whose members included Jaime Guerrero, Juan Guerrero and Martinez. While driving in a West Fargo residential area near 10 p.m., Garcia asked the driver to stop. Garcia and Charbonneau, who is much taller than Garcia, left the car. Garcia took the shotgun. Their car continued down the street and came to a stop, and Garcia and Charbonneau began walking around the neighborhood.

[¶6] In the same neighborhood, Pat and Cherryl Tendeland were dropping off their friend, Connie Guler, who had accompanied them to a prayer service in Hillsboro. In the Tendeland car parked in Guler's driveway, while seated and talking, Guler saw a "taller boy . . . maybe six feet or taller" and a "shorter one . . . five feet or less tall" walking down the sidewalk toward them. Guler thought the shorter boy was carrying a gun, but Pat thought it was an umbrella. After the boys stood near Guler's driveway for awhile, they began walking back toward the brown Ford sedan. From their suspicious behavior, Pat decided to back up and follow the boys "'to see where they [were] going.'"

[¶7] As the Tendeland car slowly approached the Ford sedan, Guler saw the taller boy walking briskly toward the Ford and the shorter boy with the gun lagging behind. The Ford's lights were on, and it started to pull away. Cherryl read off the car's license number. Guler testified about the next thing she remembered:

> I caught out of the sight of my eye something, and I turned, and this shorter boy was coming down off my berm, and he was so close, he could have opened my car door.
>
> And the next--our eyes met, and all I remember was these cold, dark eyes. And that's all I know. I don't have a face. And it just--he just raised it.
>
> I said, "My God, he's going to shoot," and it went off. I mean, it wasn't a matter of--it was just (indicating), like a click of the finger. It was so quick. And all I thought of then was Pat, you know, that he was the one that had gotten hurt.
>
> And I didn't even think about Cherryl, because I thought she was going to bounce back up. I did duck.

Cherryl was shot in the forehead and shotgun pellets also struck Pat's face, knocking a lens from his glasses. Guler was not struck by the blast. Pat, who had difficulty seeing with blood running down his face and without the lost lens, decided to drive to a nearby police station.

[¶8] Jaime Guerrero, who had remained in the Ford, testified he did not see the gunshot, but he heard it. Guerrero said Charbonneau and Garcia got back in the car about 20 seconds after he heard the shotgun blast. According to Guerrero, Garcia, who was still carrying the shotgun, said "they got her," and "'next time, don't look at me.'" The boys left the area but continued driving around, eventually returning Esparza and Charbonneau to their homes. They also stopped at a Subway sandwich store, where Garcia purchased a sandwich and argued with the clerk for having to pay more for extra meat.

[¶9] Guler, who is a nurse, tended to Cherryl's wounds while Pat drove toward the police station. Realizing Cherryl's wounds were much worse than she had first thought, Guler told Pat to stop at a convenience store and phone 911 for emergency assistance. Police and an ambulance crew arrived soon, and took Tendelands to a hospital. Cherryl was pronounced dead at the emergency room.

[¶10] Police got descriptions of the brown Ford sedan in the area of the shooting and its Minnesota license plate number, and then surveilled the owner's residence in south Moorhead. Near 11:45 p.m., a squad car spotted the Ford, began following it, and called for help. Seven or eight squad cars assisted. Police pulled behind the Ford as it turned into the car owner's driveway. [¶11] Garcia was the only occupant who refused police orders to either remain in the car or lie on the ground and, instead, fled on foot. Police recovered a sawed-off shotgun with a warm barrel from the backseat of the car along with several red and green shotgun shells. Shortly, the police chasing after Garcia captured him in an athletic field at Moorhead State University. When arrested, Garcia possessed one green and three red shotgun shells.

[¶12] A spent shotgun shell recovered at the scene of the shooting had contained size triple B steel shot that was the same size as shot recovered from Pat's wound and the Tendeland car. Shot recovered from Cherryl's body was No. 3 size shot and consistent with the shot recovered from the Tendeland car. The spent shotgun shell recovered at the scene had been fired from the sawed-off shotgun found in the brown Ford sedan.

[¶13] Neither Pat nor Guler could positively identify Garcia as the person who shot into the Tendeland car. No usable fingerprints were found on the shotgun. Atomic

> absorption tests on Garcia, Martinez, and Jaime and Juan Guerrero showed significant levels of antimony and barium on all four individuals, thus evidencing each of them could have recently fired a gun or handled a gun that had been recently fired. The pattern on the sole of Garcia's tennis shoes corresponded with shoeprints found at the scene of the shooting.

Garcia I, ¶¶ 2-13.

B. Prior State Court Proceedings

Garcia was convicted of murder and aggravated assault. On July 2, 1996, he was sentenced to life imprisonment without the possibility of parole on the murder charge and to a concurrent five-year term on the assault charge. (Doc. # 21, Ex. 1)

Garcia appealed his convictions to the North Dakota Supreme Court claiming:

1. his constitutional right to a public trial was violated when the trial court partially closed the proceedings;

2. that his conviction should be reversed because the testimony of a key witness was uncorroborated;

3. that he was denied due process because the State charged him with, and proceeded to trial upon, a street-gang-crime charge when the State allegedly knew it did not have sufficient evidence;

4. that his life sentence without the opportunity for parole constituted cruel and unusual punishment; and

5. that his Due Process rights were violated because no mitigating evidence was presented at sentencing.

The North Dakota Supreme Court affirmed Garcia's conviction on April 1, 1997, rejecting each of these challenges. Garcia I. Garcia then filed a petition for writ of certiorari with the United States Supreme Court, which was denied on October 6, 1997. Garcia v. North Dakota, 522 U.S. 874 (1997).

Garcia next filed a petition for post-conviction relief in state district court on March 20, 1998. (Doc. #21, Ex. 12). Garcia claimed in this proceeding that he was entitled to relief on account of:

1. Failure of trial counsel to provide effective assistance of counsel within the meaning of the Sixth Amendment because of:
    a. ineffectiveness during voir dire;
    b. failure to request sequestration of Mr. Tendeland, a prosecution witness;
    c. failure to adequately respond to alleged juror misconduct; and
    d. failure to present mitigating evidence during sentencing.
2. Failure of the trial court to make an affirmative effort to obtain facts in mitigation of punishment during sentencing.

(Id.; Doc. # 21, Ex. 10A)[1]

In a series of rulings, the state district court: (1) dismissed the second ground for relief because the issue was addressed on direct appeal; (2) denied the claim of ineffectiveness as to the

[1] While the state-court post-conviction proceeding was pending, Garcia also filed an initial § 2254 petition with this court on April 13, 1998, but was allowed to dismiss the petition without prejudice to his later filing a timely petition following the completion of the state proceedings, which took six years to complete through completion of the appeal to the North Dakota Supreme Court. (Doc #21, Ex. 16A, 16B, & 16C)

alleged juror misconduct based on affidavit testimony; and (3) ordered that an evidentiary hearing be held on the remaining grounds for relief. (Doc. # 21, Ex.10A)

On March 11, 2003, the state district court held an evidentiary hearing to address the remaining claims of ineffective assistance of counsel. During the hearing, Garcia's attorneys called an expert jury consultant to testify that Garcia's trial counsel's voir dire was inadequate and several persons who testified they would have provided mitigating evidence at sentencing had they been called as witnesses. The State called Garcia's trial counsel. (Doc. # 21, Ex. 8 [hereinafter "Post-Conviction Hearing Tr."])

Also, during the evidentiary hearing, Garcia's counsel attempted to supplement the record with respect to the claim of ineffectiveness in responding to the alleged juror misconduct, which had previously been ruled on by affidavit, with several offers of proof. The trial court received the offers of proof, but did not reconsider its prior ruling dismissing this claim of ineffectiveness. Following the evidentiary hearing, the trial court dismissed the remaining ineffective-assistance claims. (Doc. #21, Ex. 10) Garcia then appealed the denial to the North Dakota Supreme Court.

While on appeal, Garcia filed a second petition for post-conviction relief adding the claim that trial counsel was ineffective during the cross-examination of a prosecution witness. (Doc. # 21, Ex. 12) The North Dakota Supreme Court remanded the first proceeding for post-conviction relief so the district court could act upon the second petition. Following the state district court's dismissal of the second petition (Doc. # 21, Ex. 11), the North Dakota Supreme Court took up both petitions and affirmed the district court's denials of the petitions. Garcia v. State, 2004 ND 81, 678 N.W.2d 568. ["Garcia II"].

C. Garcia's § 2254 Proceeding

Garcia then filed his petition for habeas corpus in the United States District Court for the Southern District of Illinois on May 3, 2004, which was subsequently transferred to this district. (Doc. #1) In his petition, Garcia reasserts most, but not all, of the challenges he previously had asserted in state court, either on direct appeal or by collateral challenge, as follows:

Grounds	Description
#1	Ineffective assistance of counsel during voir dire.
#2	Ineffective assistance of counsel in failing to adequately address alleged juror misconduct.
#3	Ineffective assistance of counsel in failing to sequester prosecution witness, Pat Tendeland.
#4	Ineffective assistance of counsel in cross-examining Pat Tendeland.
#5	Ineffective assistance of counsel in failing to present mitigating information during sentencing.
#6	Violation of Sixth Amendment public-trial rights.
#7	Violation of right to a fair trial when the prosecution brought a "street gang" charge allegedly knowing it did not have sufficient evidence.
#8	The sentence of life imprisonment without the possibility of parole amounts to cruel and unusual punishment under the Eighth Amendment.

On November 10, 2004, the respondent filed her answer and a motion to dismiss. (Doc. #'s 20-21) Upon initial review, the court entered orders requiring the Respondent to file additional

records and setting a time for Garcia to respond to the motion. (Doc. # 23) The Respondent filed additional portions of the state record on April 1, 2005, (Doc. # 24) and Garcia filed his response to Respondent's Motion to Dismiss on April 26, 2005. (Doc. #'s 25-26)

The court entered another order dated June 10, 2005, (Doc. # 28) requiring production of additional state-court records, which were produced and filed as Doc. 31. Also, the court requested confirmation that previously requested jury questionnaires were not available despite the reference to the questionnaires in Garcia II. A subsequent search by State authorities uncovered three of the completed jury questionnaires that had been filed under seal in connection with a pretrial motion to exclude persons from the jury panel. Copies of these questionnaires were filed under seal with this court on July 11, 2005, as well as redacted copies. (Doc. #32) The matter is now ripe for determination.

II. SCOPE OF REVIEW

Under 28 U.S.C. § 2254, a federal court may review state-court criminal proceedings to determine whether a person is being held in violation of the United States Constitution or other federal law. This review is limited because, as a matter of federalism and comity, primary responsibility for ensuring compliance with federal law in state-court criminal proceedings rests with the state courts. Consequently, federal-court intervention is limited under § 2254(d) to the instances in which a person is being held in custody pursuant to a state-court decision that (1) is directly contrary to established federal law as enunciated by the United States Supreme Court, (2) is an objectively unreasonable application of Supreme Court precedent, or (3) is based on an unreasonable

determination of the facts based on the evidence presented in the state-court proceeding. See generally Woodford v. Visciotti, 537 U.S. 19, 26-27 (2002) (per curiam); Williams v. Taylor, 529 U.S. 362, 399-413 (2000); Williams v. Taylor, 529 U.S. 420, 436-437 (2000).[2]

Also, in keeping with the policy of state courts having primary responsibility for enforcement of federal rights in state-court proceedings, § 2254 contains a number of additional rules and procedures for ensuring that state-court convictions are given the maximum effect as allowed by law and to limit federal-court "retrials" of state-court criminal proceedings under the guise of federal habeas corpus. See Bell v. Cone, 535 U.S. 685, 693 (2002). For example, under § 2254(b), a federal court may only consider claims that have been first presented to the state court for consideration.[3] Further, it is not enough just to first present the federal claims to the state court; the federal claims must also be exhausted using available state-law procedures before there can be federal-court consideration of the claims. O'Sullivan v. Boerckel, 526 U.S. 838, 844-845 (1999);

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[2] The Supreme Court has held that the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning and has described the differences as follows:

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.*, at 405-406, 120 S.Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. Id., at 409-410, 120 S.Ct. 1495. See also *id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. at 694; see also Early v. Packer, 537 U.S. 3, 7-11 (2002) (per curiam) (distinguishing between the application of the "contrary to" and "unreasonable application" clauses).

[3] Proper presentation requires that the petitioner either refer to the particular federal constitutional right or cite to a state or federal case that raises the pertinent constitutional issue. Cox v. Burger, 398 F.3d 1025, 1031 (8th Cir. 2005). Further, it also requires presenting the factual basis for each claim. Morris v. Dormire, 217 F.3d 556, 559 (8th Cir. 2000).

Akins v. Kenny, 410 F.3d 451, 454-455 (8th Cir. 2005). And, in most cases, claims that have been procedurally defaulted at the state level cannot be reviewed in federal court.[4]

Habeas petitioners are further required to develop the factual bases for their federal claims in the state-court proceedings. Federal evidentiary hearings will not be available to develop the necessary facts unless petitioners can show (1) that they were denied the opportunity to develop the facts in the state-court proceedings despite the exercise of due diligence; (2) that their claims rely upon a new, retroactive law; or (3) that they could not have previously discovered the facts required to support their claims by the exercise of due diligence. 28 U.S.C. § 2254(e)(2). See Williams v. Taylor, 529 U.S. at 432-437; Smith v. Bowersox, 311 F.3d 915, 920-922 (8th Cir. 2002). Finally, state-court factual findings carry a presumption of correctness that can only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

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[4] The Eighth Circuit has set forth the governing rule and the relevant exceptions as follows:

> A federal district court is precluded from substantively considering a habeas corpus claim that a state court has disposed of on independent and adequate non-federal grounds, including state procedural grounds. *Reagan v. Norris,* 279 F.3d 651, 656 (8th Cir.2002). A state prisoner procedurally defaults a claim when he violates a state procedural rule that independently and adequately bars direct review of the claim by the United States Supreme Court, unless the prisoner can show cause and prejudice for the default, or actual innocence. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In other words, a state prisoner who fails to satisfy state procedural requirements forfeits his right to present his federal claim through a federal habeas corpus petition, unless he can meet strict cause and prejudice or actual innocence standards. *Murray v. Carrier,* 477 U.S. 478, 493-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

Clemons v. Luebbers 381 F.3d 744, 750 (8th Cir. 2004). The only other instance in which a federal court can consider a procedurally defaulted claim is when a federal court elects to deny the claim on the merits under § 2254(b)(3) notwithstanding the procedural default.

III. ANALYSIS

A. Claims of ineffectiveness of counsel - Claims 1-5

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant who asserts ineffectiveness of counsel must ordinarily demonstrate both that his attorney's performance was deficient and that the deficiency prejudiced the defendant.[5] The test for deficient performance under the first prong is whether counsel's performance falls below an objective standard of reasonableness under prevailing professional norms. Id. at 688; Rompilla v. Beard, 545 U.S. __, 125 S.Ct. 2456, 2462 (2005); Pfau v. Ault, 409 F.3d 933, 939 (8th Cir. 2005). In making this determination, a state or federal court must:

> ". . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. *Id.* at 689, 104 S.Ct. at 2065.

Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995). When the issue involves a matter of trial strategy, there is a strong presumption that the strategy was sound and does not amount to ineffective assistance. Bell v. Cone, 535 U.S. 685, 698 (2002); Williams v. Bowersox, 340 F.3d 667, 672 (8th Cir. 2003). Likewise, the same holds true in judging trial counsel's performance with respect to claims of inadequate investigation. Rompilla v. Beard, 545 U.S. at __, 125 S.Ct. at 2462 ("In judging the defense's investigation . . . hindsight is discounted by pegging adequacy to 'counsel's

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[5] There are three situations in which a Sixth Amendment violation may be presumed without consideration of the "performance" and "prejudice" components of Strickland. These are when (1) the accused is actually or constructively denied counsel during a critical stage of the criminal proceeding, (2) counsel fails to subject the government's case to a meaningful adversarial testing, which failure must be complete and not limited to isolated portions of the proceeding, or (3) when circumstances are present that even competent counsel could not render effective assistance. E.g., Bell v. Cone, 535 U.S. at 695-697; United States v. White, 341 F.3d 673, 677-679 (8th Cir. 2003).

perspective at the time' investigative decisions are made . . . and by giving a 'heavy measure of deference to counsel's judgments.'") (quoting Strickland , 466 U.S. at 689 & 691).

Under the second Strickland prong, prejudice is only shown when "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." E.g., Woodford v. Visciotti, 537 U.S. at 22 (quoting Strickland, 466 U.S. at 694 and adding emphasis); Perry v. Kemna, 356 F.3d 880, 888 (8th Cir. 2004). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Woodford v. Visciotti, 537 U.S. at 23 (quoting Strickland, 466 U.S. at 694).

When a state court has addressed a petitioner's ineffective-assistance claims on the merits and applied the Strickland tests, the federal courts must accord the state court's determination the deference required by 28 U.S.C. § 2254(d). Rompilla v. Beard, 545 U.S. at __, 125 S.Ct. at 2462 (2005). Assuming no issue with respect to the state court's findings of fact, the federal court's review is limited to the determination of whether the habeas petitioner has met the burden of proving that "the state court applied Strickland to the facts of the case in an objectively unreasonable manner." Woodford v. Visciotti, 537 U.S. at 25; see also Rompilla v. Beard, 545 U.S. at __,125 S.Ct. at 2462.

1. Claim of ineffectiveness during voir dire - (Claim #1)

a. Additional background re voir dire claim

Because of the substantial pretrial publicity, Garcia's attorney moved for a change of venue and also requested funds for conducting a public survey. The court denied these motions, but

indicated the motion for change of venue could be renewed at the conclusion of voir dire. (Doc. #21, Ex. 9, #'s 43, 44, 95, 96); Garcia II, ¶¶'s 8, 11.

Defense counsel further requested that the prospective jurors be surveyed in advance of trial with a written jury questionnaire. (Doc. # 21, Ex. 9, # 43) The trial court granted this request and developed an extended questionnaire that all of the potential jurors were asked to complete. (Doc. # 32) Appendix "A" sets forth the questions that were included in the questionnaire.

After the potential jurors were surveyed, Garcia's counsel moved to exclude three potential jurors prior to trial based upon their responses. (Doc. #21, Ex. 9, # It appears this motion was successful.[6]

The entire first day of the five-day trial was devoted to jury selection. During voir dire, defense counsel's questioning led to two other panel members being excused for cause because they did not think they could be fair and impartial. (Doc. #24, Trial Tr. - Vol. 1 at 26-29, 69-75) [hereinafter "Trial Tr."] While several other jurors were excused for other reasons, jury selection proceeded relatively smoothly with each of the parties passing for cause several times, as well as exercising their peremptory challenges, in the process of seating a twelve-person jury and two alternates. (Trial Tr. - Vol. 1 at 112-244)

At the beginning of the second day of trial, defense counsel withdrew its pending request for a change of venue. The following exchange took place:

> MR. MOTTINGER: Two items, Your Honor. First, we need to clean up the matter of the change of venue motion, which the Court earlier ruled on.

[6] The State's brief and the North Dakota Supreme Court's opinion suggest the motion was successful, but this could not be confirmed from the record materials made available to the court. However, the persons whom the motion sought to exclude were not called for examination during voir dire. (Doc. 21, Ex. 5 at 8); Garcia II, ¶ 11.

At this point, we would withdraw that motion. We're satisfied that we were able to obtain a fair and impartial jury.

THE COURT: All right. And, Mr. Garcia, you agree?

DEFENDANT GARCIA: Yes, sir.

THE COURT: We'll go ahead. You have had a chance to talk to your lawyer about this?

DEFENDANT GARCIA: Yes, sir.

THE COURT: All right. We'll go ahead and deny the motion - - or allow the defense to withdraw the motion at this time.

(Trial Tr. - Vol. 2 at 254)

Garcia has a number of complaints with respect to trial counsel's handling of voir dire. He claims that trial counsel appropriately moved for a change of venue given the extensive media coverage. But, when the motion was denied subject to reconsideration at the conclusion of voir dire, his attorney failed to adequately question the potential jurors about their exposure to the pretrial publicity - essentially abandoning the strategy of attempting to get a change of venue. Garcia also claims that trial counsel failed to adequately inquire about the potential for racial prejudice - given that he was a Hispanic residing in an overwhelmingly "white" community and the fact that he was also charged with a "street-gang" offense. Garcia claims that, instead, trial counsel spent most of his time during voir dire giving lectures about the court system and the presumption of innocence. Finally, Garcia claims his attorney implicitly suggested to the jury panel he was guilty by repeatedly

asking (eleven of the fourteen persons who served on the jury) whether they could return a verdict of not guilty that the general public would oppose and be angry about. (Doc. # 21, Ex. 4; Doc. #25)

During the state-court evidentiary hearing, Garcia's new counsel called Dr. Ann Burnett to testify that Garcia's trial counsel's voir dire was inadequate. Dr. Burnett's area of academic expertise is the study of jury behavior. In addition to her academic study and writings, she has worked as a consultant assisting attorneys with jury selection, preparation of pretrial jury questionnaires, and conducting mock trials. Also, she had completed one year of law school. (Post-Conviction Hearing Tr. at 8-14)

Dr. Burnett testified that Garcia's trial counsel's voir dire did not meet the standards of what would be expected of a criminal practitioner. In particular, she had the following criticisms:

- Trial counsel failed to adequately inquire about the impact of pretrial publicity. According to her analysis: only two members of the panel were adequately questioned about media exposure; a third were not questioned at all about this subject with four of those persons serving on the jury; and 55% were asked only perfunctory questions with eight of those persons serving on the jury. She opined that the failure to ask sufficient questions prevented defense counsel from determining whether the panel members had already formed an opinion regarding Garcia's guilt and whether there were other reasons for exercising peremptory challenges. (Id. at 19-21)
- Trial counsel failed to adequately question about racial biases and prejudices. According to her analysis: only three panel members were adequately questioned with two of those persons serving on the jury; seven panel members were asked no

questions whatsoever about Hispanic people and gang membership with three of those persons serving on the jury; and almost 66.6% of the panel were asked only perfunctory questions with nine of those persons serving on the jury. (Id. at 26)

- Trial counsel should have requested that the voir dire be conducted individually out of the hearing of the rest of the panel so that trial counsel could have more fully explored the impact of pretrial publicity and potential racial bias without tainting the remaining panel. Also, even if not requested initially, he should have requested it when potentially tainting information was forthcoming, such as, when one panel member stated she could not be fair because her sister had been raped by a Hispanic. (Id. at 29-35). Further, the combination of not conducting an individualized and segregated voir dire with lecturing the jurors on constitutional principles and the need to be fair educated the remaining jurors as to what their responses should be and prohibited disclosure of meaningful information that could have supported the motion for change of venue or additional motions to strike for cause. (Id. at 35-36)
- Trial counsel should not have attempted to rehabilitate panel members who expressed an opinion about Garcia's guilt by lecturing them on constitutional principles. (Id. at 35-36)
- Trial counsel should not have excessively questioned about the possibility of returning an unpopular verdict (twenty-one separate occasions) because this implicitly communicated to the panel the message that the defense case was weak.

Of the fourteen jurors who served on the jury, eleven were questioned about this subject. (Id. at 36-37)

- Trial counsel appeared to simply go through the motions of voir dire and, in many cases, failed to ask necessary and obvious follow-up questions. (Id. at 38-39)
- Trial counsel asked fewer and fewer questions as the voir dire progressed and appeared to lose energy. The last six potential jurors were asked very few questions and were inadequately examined. Two of those persons ended up sitting on the jury. (Id. at 40-41).

In addition to her testimony, Dr. Burnett's report was marked as an exhibit and this report contains additional detail supporting her opinions. (Doc. # 25, Ex. 1)

Upon cross-examination, Dr. Burnett acknowledged she had not viewed any of the jury questionnaires that had been used because she had been advised that the questionnaires were no longer available. Consequently, she did not know what questions had been asked, much less what responses had been given. (Id. at 47-48, 82) She also acknowledged she did not have the benefit of the non-verbal communication that occurred between the potential jurors and defense counsel because she was not present when jury selection took place. (Id. at 50-52)[7]

[7] The State and Garcia's new counsel both assumed that all of the jury questionnaires had been destroyed. (Id. at 47-48, 82, 151) In fact, this assumption persisted when the parties later filed their briefs with the North Dakota Supreme Court on appeal from the denial of his state-court petitions for post-conviction relief. (Doc. #21, Ex. 4 at 1, Ex. 5 at 7-8) However, both parties overlooked the fact that Garcia's trial counsel had filed three of the completed questionnaires under seal in support of a motion to exclude those persons from the jury and that these questionnaires were still in the record and available for the purpose of being able to document what questions had been asked. (Doc. # 32) It further appears that the North Dakota Supreme Court located the three questionnaires and relied upon them in deciding the merits of Garcia's appeal in that all the three questionnaires bear the North Dakota Supreme Court's stamp and the court makes reference to the questionnaires in its decision. Garcia II at ¶ 8.

In response to the evidence presented by Garcia, the State presented an affidavit from Garcia's trial counsel and also called him to testify during the post-conviction evidentiary hearing. The record of his testimony indicates that Garcia's trial counsel was a highly-experienced criminal defense attorney who had handled thousands of criminal cases and who had significant experience trying cases to juries, including several high-profile murder cases. (Id. at 140-143; Doc. # 21, Ex. 13).

Garcia's trial counsel testified that the time spent on voir dire and the level of questioning was consistent with what he had done in other cases, particularly given the information that was available from the jury questionnaires, and was no less than the level of questioning that traditionally has been done in the federal courts in North Dakota where the trial judges do most, if not all, of the questioning. He also described jury selection as being an "art" and not a "science" and explained his particular approach. For example, he testified that he sometimes prefers jurors who are forthright enough to acknowledge that they have some knowledge about the case or may have a little bias or prejudice because this reflects upon their honesty and is something that can be dealt with. He also indicated that he uses the jury selection process to try and educate the jurors. (Post-Conviction Hearing Tr. at 143-154) Finally, he indicated he had not abandoned the prospect of renewing the change of venue motion going into voir dire, but the circumstances were such that a jury could be picked. He testified:

> Q. Do you - - do you feel that when you were done with jury selection that you had a good jury?
>
> A. I was satisfied with the jury we had under the circumstances. I thought it was a very good jury.

Q. What do you mean by "under the circumstances?"

A. It was a high-profile case. We weren't going to find 12 people who hadn't heard anything about it.

Q. But you felt that notwithstanding that that you had a decent jury and didn't need to renew your request for change of venue.

A. Yes. I didn't think that it was necessary at that point. Obviously the request would have been renewed if we wouldn't have been - - if we kept excusing people for cause, we weren't able to seat a jury, then it probably would have been appropriate to renew that request.

(Id. at 153)

The state district court denied the claim of ineffectiveness during voir dire holding that Garcia had failed to prove his counsel's performance fell below the objective standard of reasonableness under Strickland. The court emphasized the fact the jury questionnaires provided additional information regarding the potential prejudices of the jury pool. Further, the court concluded that the tactic of using voir dire to educate the jurors was not unreasonable.[8] (Doc. #21, Ex. 10)

On appeal, the North Dakota Supreme Court upheld the district court's determination and stated in relevant part the following:

[¶8] Counsel's actions during voir dire are considered matters of trial strategy. Miller v. Francis, 269 F.3d 609, 615 (6th Cir. 2001). "An unsuccessful trial strategy does not make defense counsel's assistance defective, and we will not second-guess counsel's defense strategy through the distorting effects of hindsight." Breding, 1998 ND 170, ¶ 9, 584 N.W.2d 493. After reviewing the record, we are convinced trial counsel's

[8] The state district judge who made the rulings with respect to this and the other claims of ineffectiveness was not the trial judge.

representation during voir dire did not fall below the objectively reasonable standard established by Strickland. Voir dire was conducted through the use of jury questionnaires and questioning by the court and counsel. It is reasonable to conclude trial counsel reviewed and evaluated the questionnaires because, prior to conducting voir dire of the venire panel, he sought and received the dismissal of three potential jurors based upon their answers in the questionnaires. Trial counsel testified he used the questionnaires and the questionnaires "went into ethnic biases and prejudices, some questions about gang activity, that type of thing." Although the questionnaires were not used by the parties during the post-conviction relief proceedings, the questionnaires of the potential jurors dismissed before voir dire of the whole panel are a part of the entire record for review on appeal. The questionnaires contained inquiries regarding whether the potential jurors believed race affects the likelihood that a person will commit crimes and addressed whether the potential jurors had heard or read about crimes involving criminal street gang activity in the Fargo area.

[¶9] Trial counsel also filed an affidavit, in which he indicated that he uses jury selection as an "education process." He testified that he approaches voir dire in highly publicized cases such as Garcia's to "try and get through to [the jurors] that they have to base their ultimate deliberation on what they heard from the witness stand, not what they read in the newspapers before court." Regarding biases and prejudices in cases involving minorities, he stated, "If [potential jurors] have those prejudices or biases, you have to try and determine whether or not they would be able to put them aside and decide the case on a fair and impartial basis."

[¶10] We agree with the Sixth Circuit that "criminal defense lawyers should be given broad discretion in making decisions during voir dire. Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors." Miller, 269 F.3d at 620. Trial counsel in this case did not ask all prospective jurors the same questions, but each member of the final jury panel essentially indicated they could be fair and impartial. We agree that

> [t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Hughes v. United States, 258 F.3d 453, 459 (6th Cir. 2001) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)). To hold that trial counsel's assistance fell below an

> objective standard of reasonableness in this case would impose a similarly impossible standard upon criminal defense lawyers.
>
> [¶11] Garcia's trial counsel did not simply "go through the motions" in voir dire. He sought a change of venue, was successful in having potential jurors dismissed before voir dire based on their responses to the questionnaires, challenged jurors for cause during voir dire, and exercised five peremptory challenges. These strategic decisions were made based on his goal to educate the jury and choose a fair, impartial jury which would not be influenced by the publicity surrounding the case or by racial prejudice. This is not an unreasonable goal in choosing a jury, and trial counsel's strategy in reaching that goal was not objectively unreasonable. We conclude the district court did not err as a matter of law and it was not clearly erroneous for it to find trial counsel's representation did not fall below an objective standard of reasonableness.

Garcia II, ¶¶ 8-11.

b. Analysis of claim of ineffectiveness re voir dire

The record clearly supports the conclusion that Garcia's trial counsel did more than simply go through the motions. He moved for a change of venue and requested funds for a public survey. While not successful on these motions, he was successful in convincing the trial court to develop and utilize an extended written jury questionnaire that asked many of the "open-ended" types of questions that Garcia's post-trial jury consultant testified were valuable and that also addressed the issue of possible racial bias and, to some extent, the exposure to pretrial publicity. Further, Garcia's counsel followed up on the results of the questionnaire by moving to exclude several of the potential jurors based upon their responses prior to trial. Then, during voir dire, Garcia's counsel successfully elicited responses that resulted in two additional jurors being excluded for cause.

Further, the record also supports the North Dakota Supreme Court's implicit rejection of Dr. Burnett's opinion that trial counsel was ineffective in addressing the potential for racial prejudice

and taint from the pretrial publicity. While counsel did not question all of the potential jurors about these subjects, there is no indication that he had to given the breadth of the questions in the questionnaire (which Dr. Burnett was unable to review) and the fact that he sometimes addressed these issues through the use of broader, more general questions. For example, the following exchange lead to a successful challenge for cause of one of the panel members:

> Q. If you had to decide right now whether he was guilty or not guilty, how would you decide?
>
> A. What I read in the paper and what I read in the news, I would say, guilty.
>
> Q. You find yourself leaning that way?
>
> A. Yes

(Trial Tr. - Vol. 1 at 27)

In addition, what cannot be overlooked, and what Dr. Burnett could not evaluate from the cold record, are the intuitive judgments that an experienced criminal defense attorney can draw during voir dire from the manner in which the potential jurors present themselves and answer questions. This is because "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words." United States v. Blom, 242 F.3d 799, 805 (8th Cir. 2001) (quoting Reynolds v. United States, 98 U.S. 145, 156-157 (1878)). Consequently, when a juror responds that he or she can be fair and impartial, more detailed examination may be unnecessary, particularly in this case since counsel had the additional information from the jury questionnaires. See, e.g., United States v. Brown, 540 F.2d 364, 378-379 (8th Cir. 1976).

Also not unreasonable is the North Dakota Supreme Court's conclusion that trial counsel's use of voir dire to "educate" the jury (including receiving commitments from jurors as to how they would approach deciding the case) was a matter of trial strategy that fell within prevailing norms. In fact, criminal defense counsel frequently employ this strategy - particularly in cases like this one in which the evidence of guilt is strong and defense counsel are often reduced to looking for the one or two jurors who might vote for acquittal and who have the fortitude to persist in that vote.

Finally, although the North Dakota Supreme Court did not explicitly discuss the issue, the record also supports its implicit rejection of the argument that failure to request individualized and segregated voir dire amounted to ineffective assistance. First, a trial court has substantial discretion as to how it conducts voir dire, and there is not a constitutional right to individualized and segregated voir dire in every case. See United States v. Brown, 540 F.2d at 378-379. Second, when asked about this issue, trial counsel explained that individualized and segregated voir dire is rarely, if ever, done in the state and federal courts in North Dakota - even in high-profile cases. Counsel testified that he had handled two other high-profile murder cases in the same locality and that the juries in those cases were selected without the use of individualized and segregated voir dire. (Post-Conviction Hearing Tr. 245-146) Third, the use of the jury questionnaire allowed the sensitive subject matters to be addressed on an individualized basis - at least initially. And, as already noted, counsel did move to exclude three of the potential jurors based upon their responses to the questionnaires prior to trial. Fourth, there is nothing in the record that suggests the overall responses to the questionnaires indicated a need for individualized and segregated examination.[9] See United

[9] The bulk of the juror questionnaires are no longer available. At one point, the trial court indicated that 22% had indicated some concern about being able to set aside their preconceived notions and that "a number of them" had indicated a belief that Hispanics are were more likely to commit crimes than other ethnic groups. (Trial Tr. - Vol. II

States v. Brown, 540 F.2d at 379 & n.13. While individualized and segregated voir dire may be desirable in some cases (and possibly constitutionally required in others), it cannot be said that the failure to request it in this case, given these particular circumstances, was objectively unreasonable as measured by prevailing norms.[10]

Consequently, it cannot be said that the North Dakota Supreme Court acted unreasonably when it concluded that trial counsel's handling of voir dire fell within prevailing norms and was not objectively unreasonable. This being the case, Garcia has not satisfied the first Strickland prong.

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at 328) However, neither Garcia's counsel nor the trial judge expressed a concern about the need for an individualized and segregated voir dire after receiving the completed questionnaires.

[10] In reaching this conclusion, the relevant ABA standards have been considered. Standard 8-3.5 of the ABA Standards for Criminal Justice relating to Fair Trial and Free Press provides in relevant part:

> (a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. An accurate record of this examination should be kept by a court reporter or tape recording whenever possible. The questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to case aside any preconceptions would be a dereliction of duty.

Standard 15.24 of the ABA Standards for Criminal Justice: Discovery and Trial by Jury, 3rd Edition, states in part:

> (e) Jurors should be examined outside the presence of other jurors on sensitive matters or prior exposure to potentially prejudicial material.
>
> (1) Sensitive matters are those matters which might be potentially embarrassing or intrusive into the juror's private life, feelings or beliefs, or those matters which if discussed in the presence of the jury panel, might prejudice or influence the panel by exposing other potential jurors to improper information.
>
> (2) Examination of the prospective juror with respect to that juror's exposure to potentially prejudicial material should be conducted in accordance with ABA Standards for Criminal Justice relating to Fair Trial and Free Press.

However, the ABA standards are only guides and "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland v. Washington, 466 U.S. at 688-689.

Further, even though the North Dakota Supreme Court did not reach the issue, Garcia has also not satisfied the second Strickland prong, *i.e.*, proving that he was prejudiced by his attorney's performance during voir dire.

To satisfy Strickland's second prong, Garcia must prove actual prejudice. This is because prejudice will only be presumed in the rare and extreme cases when pretrial publicity is so extensive and corrupting that unfairness must be presumed (e.g., Murphy v. Florida, 421 U.S. 794, 798 (1975); Norris v. Pruett, 153 F.3d 579, 584-585 (1998)), or when the racial bias in the community is demonstrated to be pervasive (see Meeks v. Moore, 216 F.3d 951, 966-968 (11th Cir. 2000); cf. Ristaino v. Ross, 424 U.S. 589 (1976)), neither of which was the case here.

Further, it is not enough simply to show that the jurors were exposed to pretrial publicity. For if that was the test, no high-profile case could ever be tried. In this context, the Eighth Circuit has expressed the relevant test for showing prejudice as follows:

> The Constitution does not require jurors to be ignorant of the facts and issues involved in a case. *See Irvin*, 366 U.S. at 722, 81 S.Ct. 1639; *Cox v. Norris*, 133 F.3d 565, 570 (8th Cir.1997). Instead, the relevant question is whether the jurors actually seated "had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035, 104 S.Ct. 2885; *see also Mu'Min*, 500 U.S. at 430, 111 S.Ct. 1899. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639; *see also Cox*, 133 F.3d at 570; *Perry*, 871 F.2d at 1390.
>
> The question whether a jury was actually impartial is "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036, 104 S.Ct. 2885. Because a determination of this kind "is essentially one of credibility, and therefore largely one of demeanor," the trial court's resolution of the question is entitled to special deference, *id*. at 1038, 104 S.Ct. 2885, and may be overturned only for "manifest error." *Id*. at 1031-32, 104 S.Ct. 2885; *see also Hill*, 28 F.3d at 847-48.

Norris v. Pruett, 153 F.3d at 587.

In this case, all of the persons who actually served on the jury indicated they could be fair and impartial. Further, there is nothing about their responses that suggests they should not have been believed by the trial court and counsel.[11] See, e.g., Murphy v. Florida, 421 U.S. at 800-803; Norris v. Pruett, 153 F.3d at 587-588. Further, the fact that jury selection went relatively smoothly with only a few persons having to be excused for cause is further indicative of the jurors' impartiality. See id.

Garcia points to the fact that one of the potential jurors (who was excluded for cause) stated she could not be fair because a Hispanic had raped her sister and that another panel member later commented on this statement. (Trial Tr. - Vol. 1 at 69-75, 83) Garcia argues this tainted the rest of the jury panel. However, there is no evidence of this, and the voir dire responses of the other panel members, including those selected to serve on the jury, indicate otherwise.[12]

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[11] The relevant portions of the voir dire testimony of the persons who actually served on the jury are the following with page references to Volume II of the Trial Transcript (Doc. #24): Juror R.J. (42-44); Juror M.S. (45-50); Juror E.B. (56-61); Juror J.G. (61-66); Juror V.K. (75-86); Juror K.H. (86-91); Juror G.S. (91- 96); Juror J.S. (18, 96-99); Juror G.M. (99-103); Juror J.H. (179-187); Juror J.E. (201-205): Juror B.G. (212-217); Alt. Juror J.R (226-232); Alt. Juror L.B. (238-243). The briefs submitted by the parties to the state district court identify the persons who served on the jury and also contain a summary of their voir dire testimony. (Doc. #31, Ex. A at 2-5 & Ex. D at Enclosure 1).

[12] The prior footnote references the relevant voir dire testimony of the jurors who served on the jury. The person who commented on the statement made by the panel member who said her sister had been raped did serve on the jury but stated she could be fair and impartial and that she had no preconceived notions about Hispanics committing crimes. (Trial Tr. Vol. II at 83-86. Further, the following excerpts of testimony, given by persons examined after the panel member who made the comments about the rape, are indicative of the fact that the rest of the panel was not overwhelmed by these comments:

Juror K.H.

Q. Do you believe that because Mr. Garcia is of Hispanic background, that he's more likely than not to have committed this crime?

A. Violent crime can happen anywhere to anybody. It doesn't matter because of your race.

(Id. at 90)

Juror J.S.

Q. The fact that Mr. Garcia is of a Hispanic background has caused some concern for

In conclusion, there is no evidence of actual prejudice. In fact, after careful review of the voir dire transcript, the satisfaction that Garcia and his counsel expressed with the jury is understandable; it appears the jurors were fair-minded and did not have fixed opinions preventing them from being impartial.

2. Claim of ineffectiveness in not responding to alleged juror misconduct - (Claim #2)

Garcia's § 2254 petition frames his claim of ineffectiveness in not responding to alleged juror misconduct as follows:

> My counsel was informed that a juror was observed talking with members of the victims family on two separate occasions, yet my counsel did not inform the judge or take appropriate action to determine whether or not there had been improper communication. I recall my counsel stating, "if it happens again, ill [sic] let the judge know.

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other members of the jury panel.

Do you have any preconceived leanings one way or the other in terms of the propensity of people of Mr. Garcia's background to commit a crime?

A. No. I believe we're all capable of it. Crime pretty much runs across the country regardless.

(Id. at 98)

Potential juror

Q. Does the fact that Mr. Garcia is of a Hispanic background cause you any concern?

A. No.

Q. You don't believe racial minorities are more likely than others to commit a crime?

A. People commit crimes, races don't commit crimes.

(Id. at 110)

Juror J.H.

Q. Do you have any feelings in regard to whether or not people of minority ethnic backgrounds are more likely than not to be involved in the commission of a crime?

A. The are no more likely than anyone else.

Q. The fact that Mr. Garcia is Hispanic doesn't cause you any problems or cause you to lean one way or the other?

A. Not at all.

(Id. at 182)

(Doc. # 1) Unfortunately, the state-court record with respect to this claim is somewhat muddled.

Garcia presented his claim of ineffectiveness related to alleged juror misconduct in the state-court post-conviction proceedings by submitting an affidavit from a family acquaintance, Ms. Jill Johnson-Danielson.[13] In the affidavit, Ms. Johnson-Danielson stated she observed one of the trial jurors socializing and smoking with persons unknown just outside the main entrance to the courthouse during breaks on two days of the trial. She claims she informed Garcia's trial counsel of what she observed and that, to her knowledge, he took no action. (Doc # 21, Ex. 14)

In response, the State submitted an affidavit from Garcia's trial counsel in which he stated that he did not recall the conversation with Ms. Johnson-Danielson, but that, if it occurred, he probably would have told her she should keep an eye on it and he would also. (Doc. # 21, Ex. 13). The statement that Garcia attributes to his counsel in his petition to this court, which is that he would notify the judge if the socializing continued, is not part of the record in the state-court proceedings, but is also not inconsistent with the record.

The state district court dismissed the claim of ineffectiveness in addressing the alleged juror misconduct based on the affidavit testimony and did not include the claim as one of the subjects of the evidentiary hearing that it ordered with respect to the other claims of ineffectiveness. In so ruling, the district court characterized the incident as one juror reportedly having contact with members of the public during recesses. (Doc. #21, Ex. 10A)

[13] Garcia's first petition for post-conviction relief in state court dated March 20, 1998, makes no mention of an ineffectiveness claim based upon trial counsel's failure to address improper juror contacts. It appears the claim was added by way of an affidavit filed in support of the first petition. In any event, the state courts permitted the claim and decided it on the merits.

Undaunted by this ruling, Garcia's counsel attempted to supplement the record with respect to this claim of ineffectiveness by offering additional evidence at the evidentiary hearing held on the other claims for post-conviction relief. During the hearing, he questioned Garcia's aunt, Ms. Alexander, regarding an incident she claimed to have observed. Alexander testified that a group of persons from the trial were assembled on benches outside the courthouse smoking cigarettes during a break, which included Alexander and her mother on one bench and members of the Tendeland family on another bench. She testified that the jurors came out and that they were "talking out there, laughing and everything, just having conversation with the Tendelands." (Post-Conviction Hearing Tr. at 129-30)

However, before further testimony could be elicited from Ms. Alexander, the State objected on the grounds that the order for the evidentiary hearing had not included the issue of juror misconduct and that the trial court had already ruled on the issue by affidavit. The court sustained the objection, but allowed counsel to make an offer of proof. Garcia's counsel then proffered that Ms. Alexander was prepared to testify that she observed two or more members of the jury talking to members of the Tendeland family during a break, that she informed Garcia's trial counsel and requested that he bring it to the court's attention, and that he did not do so. (Id. at 130-131)

Finally, Garcia's counsel was permitted to question Garcia's trial counsel regarding the alleged juror contacts as part of the offer of proof. Garcia's trial counsel testified he did not report to the court the contact claimed by Ms. Johnson-Danielson in her affidavit (of one juror talking to a nonjuror during a break) stating he had talked to the bailiffs about it. (Id. at 158-159) This was inconsistent with his earlier affidavit in which he claimed he did not specifically recall the conversation, but it is possible his recollection had been refreshed by the time of the hearing. (Doc.

21, Ex. 13) When asked about Ms. Alexander's claim that she had talked to him about her having seen jurors talking with the Tendeland family (which counsel for Garcia characterized as the "same incident" as the one observed by Ms. Johnson-Danielson), Garcia's trial counsel testified he did not recall any such conversation with Alexander. (Post-Conviction Hearing Tr. at 158-159)

Following the evidentiary hearing, the state district court issued an order dismissing the ineffective-assistance claims that were the subject of the hearing. In that order, the court made reference to its earlier decision denying the claim of ineffectiveness based upon juror misconduct, but did not reconsider the decision consistent in light of the additional proffered evidence. (Doc. #21, Ex. 10) On appeal to the North Dakota Supreme Court, Garcia argued the issue of juror misconduct, but made reference only to the testimony of the contact reported by Ms. Alexander that was objected to and not considered by the district court.[14] (Doc. # 21, Ex. 4 at 10)

[14] Garcia's counsel also attempted to call Joseph Garcia as to the issue of juror misconduct during the evidentiary hearing. The State again objected to this testimony as being outside the scope of the issues to be resolved arguing the issue had already been resolved by affidavits. The district court sustained the objection, but allowed Garcia's counsel to make an offer of proof that Joseph Garcia would testify that he observed a juror talking with Pat Tendeland in the hallway outside the courtroom. (Post-Conviction Hearing Tr. at 160-170) When examined about this alleged contact, Garcia's trial counsel testified he had no knowledge of any such contact and that he would have moved for a mistrial had this been reported to him. (Id. at 159)

No mention was made on appeal to the North Dakota Supreme Court of a juror allegedly speaking the with Pat Tendeland in the hallway. It may very well have been that, by the time of the appeal, Garcia's counsel had determined Joseph Garcia could not support the proffer. In any event, it does not appear that Garcia's petition to this court includes any claim of a juror speaking with Pat Tendeland, who was more than just a member of the public in that he was one of the victims and an important prosecution witness. A fair reading of the petition indicates it is confined to one or more jurors conversing with the victim's family during "smoke-breaks." (Doc. # 1) But, even if Garcia's petition is construed as including the alleged contact with Pat Tendeland, the claim would fail for several reasons. First, this claim was not presented to the North Dakota Supreme Court, which bars this court's consideration of the claim based on the authority cited earlier relating to the consequences of failing to exhaust claims in state-court proceedings. Second, the proffer regarding the alleged juror contact with Pat Tendeland did not indicate the contact involved any matter related to the trial; hence, there is no presumption of prejudice for the reasons articulated later herein. Third, Garcia's trial counsel denied any knowledge of this particular contact and the proffer did not indicate it was made known to him. In the absence of evidence that trial counsel was aware of the alleged contact, any claim for ineffectiveness on this grounds must fail.

The North Dakota Supreme Court upheld the state district court's denial of this claim for ineffective assistance. However, it is not clear from the court's ruling whether it confined its review to the issue as framed by the affidavit testimony or whether it also considered the broader scope of facts argued by Garcia in his brief.[15] The essential difference is this: The affidavit testimony did not indicate who the jurors had contact with, while the evidence argued by Garcia (based on the testimony of Ms. Alexander) was that they had contact with members of the victims' family.

However, in the final analysis it does not make any difference. This is because the North Dakota Supreme Court upheld the district court's dismissal of this claim based on Garcia's failure to prove he had suffered any prejudice. In requiring proof of actual prejudice, the court rejected Garcia's argument that prejudice must be presumed under Remmer v. United States, 347 U.S. 227 (1954). The court held that the presumption of prejudice under Remmer only applies when there is evidence the alleged improper contact with the jury involved discussions about the case. Garcia II, ¶¶ 14-15.

The North Dakota Supreme Court's conclusion that actual prejudice must be proved absent proof that the juror contact involved case-related discussion is not contrary to established federal law as enunciated by the United States Supreme Court. Remmer can reasonably be distinguished on the grounds that it only applies when the juror contact involves communication about a matter pending before the jury. E.g., United States v. Brown, 923 F.2d 109, 111-112 (8th Cir. 1991); O'Dell

[15] The court's opinion makes reference to the denial of the issue by the state district court based on the affidavit testimony. However, the court's opinion also makes reference to the fact that "at least one" juror was seen talking with non-jurors - the affidavit of Ms. Jill-Johnson reports only a single juror having contact. Further, in disposing of the issue, the court noted the lack of evidence of any communication about the trial between "the jury" and non-jurors.

v. Armontrout, 878 F.2d 1076, 1080-81 (8th Cir. 1989). Further, Garcia has not pointed to any opinion of the United States Supreme Court holding prejudice must be presumed in instances of when the casual (albeit undesirable) contact is with members of a victim's family, and the conclusion that actual prejudice must be shown in such instances is not unreasonable. See id. Consequently, the North Dakota Supreme Court's decision with respect to these points must be accepted, which leaves only the question of whether actual prejudice was demonstrated.

As to that issue, the conclusion by the North Dakota Supreme Court that no prejudice was proved is also reasonable. First, the record is absolutely devoid of any evidence (such as juror affidavits) indicating there was discussion about the case or that the jurors were somehow influenced by the contacts. Second, in the absence of such proof, any claim that the outcome of the trial would have been different amounts to nothing more than utter speculation - particularly given the strength of the State's case as detailed elsewhere in this report.

3. Claim of ineffectiveness in failing to sequester a witness - (Claim #3)

Garcia claims that his trial counsel provided ineffective assistance when he failed to move to sequester prosecution witness Pat Tendeland, the husband of the deceased and one of the victims. Garcia claims he was prejudiced because Tendeland changed his testimony based upon what other witnesses testified to. Specifically, Tendeland was unable to remember the color of the shooter's jacket when he gave a written statement shortly following the shooting. When he testified at trial after listening to other witnesses, he stated that the assailant had been wearing a green jacket - the color of the jacket that Garcia was wearing when he was arrested. (Trial Tr, - Vol. IV at 891-897)

When cross-examined about this discrepancy, Tendeland stated he told the police the jacket was green sometime after he had been shown a jacket during a meeting at the police station approximately a week after the shooting. (Id. at 894-897). However, the police officer involved in showing the jacket testified it was a different jacket belonging to one of the other juveniles and that Tendeland had never told police prior to trial the shooter's jacket was green. (Id. at 899-910)

In the state post-conviction proceedings, the State offered an affidavit from Garcia's trial counsel in which he explained that he consented to Tendeland sitting in on the trial following a prosecution request because he believed Tendeland's testimony was "locked in" given the prior written statement. He stated he consulted with Garcia prior to giving his approval and that Garcia agreed. He also stated that he confronted Tendeland with the change in his recollection during cross-examination and argued the change to the jury during final argument. Finally, he expressed the opinion that Tendeland's change in recollection provided an opportunity, which he did not otherwise have, to attack his testimony, and that it actually helped the defense case. (Doc. 21, Ex. 13)

The state district court concluded that Garcia failed to demonstrate prejudice with respect to this claim. The court concluded that Tendeland's inconsistent testimony likely harmed his credibility and that there was plenty of other evidence to support the conviction. (Doc. # 21, Ex. 10)

On appeal, the North Dakota Supreme Court rejected Garcia's failure-to-sequester claim based on both Strickland prongs. The court concluded that trial counsel's decision to allow Tendeland to remain in the courtroom fell within the realm of trial strategy that the court did not consider to be ineffective assistance. The court also agreed there was ample evidence to support the

conviction and that it was unlikely that the claimed ineffectiveness had any impact on the outcome. Garcia II, ¶¶ 12-13.

The decision not to sequester a prosecution witness is a matter of trial strategy, see Fernandez v. United States, 553 F.Supp. 260, 266 (S.D.N.Y. 1982), and the North Dakota Supreme Court's conclusion that it did not amount to ineffective assistance under the circumstances is not unreasonable. So also was the court's conclusion that Garcia failed to prove prejudice.

A review of the trial transcripts indicates that the change in recollection was a slight one, from a "dark-colored" coat to a "green" coat (Trial Tr. - Vol. IV at 893-894), and that there was other ample evidence pointing to Garcia's guilt. This other evidence included: the testimony of Jamie Guerrero that Garcia took the shotgun with him when exited the vehicle with Charbonneau, that he returned to the vehicle within seconds of the shotgun blast still holding the shotgun, and that he stated that "they got her" (Trial Tr. - Vol. II at 362-368); Pat Tendeland's and Connie Guler's testimony that it was the smaller of the two boys who was carrying the gun coupled with the fact that Garcia was significantly shorter than Charbonneau (Trial Tr. - Vol. IV at 789-797, 872, 876-877, 891); the shotgun shells recovered from Garcia at the time of his arrest (Trial Tr. - Vol. III at 516, 518-519); the atomic-absorption tests indicating that Garcia had recently fired or handled a gun that had been discharged (Trial Tr. - Vol. III at 577-578, 607-612; Trial Tr. - Vol. IV at 748-757); and the fact that footprints found at the scene matched Garcia's tennis shoes. (Trial Tr. - Vol. I11 at 605, 692-700; Trial Tr. - Vol. IV at 757-768). Under these circumstances, it would be utter speculation to say that the "improvement" in Tendeland's testimony made any difference.

In fact, a review of the transcripts indicates that defense counsel did not have much to work with in attacking Tendeland's credibility and that he was probably correct when he concluded that the discrepancy between Tendeland's written statement and his trial testimony actually helped Garcia's case. This is because the "improvement" in Tendeland's testimony was slight and any additional weight it added to the State's case appears to have been more than offset by defense counsel having something to talk about in terms of Tendeland's credibility, *i.e.*, the discrepancy between the written statement and the trial testimony and the police officer's impeachment of Tendeland's explanation for his improved testimony.

4. Claim of ineffectiveness during cross-examination - (Claim #4)

Under North Dakota law, a state claim for post-conviction relief can be denied if a petitioner inexcusably fails to present the claim in an earlier petition for post-conviction relief. N.D.C.C. § 29-32.1-12. The state district court dismissed Garcia's claim of ineffective assistance in cross-examining Pat Tendeland because of the failure to include the claim in Garcia's first petition for post-conviction relief. On appeal, the North Dakota Supreme Court concluded that Garcia failed to provide sufficient justification for the failure to include this claim in his first petition and upheld the trial court's dismissal based upon procedural default. Garcia II, ¶¶ 21-22. In so ruling, the North Dakota Supreme Court applied the provisions of N.D.C.C. § 29-13.1-12, which, among other things, permits a court to dismiss a claim for relief that petitioner has inexcusably failed to raise either on direct appeal or in a prior post-conviction proceeding, and cited to prior North Dakota cases reaching the same conclusion. Id. ¶ 22.

After reviewing the record of the state court proceedings, it is clear that Garcia procedurally defaulted on his claim of ineffectiveness for inadequate cross-examination at the state-court level. Further, North Dakota's procedural bar is firmly established and regularly followed. E.g., Steinbach v. State, 2003 ND 46, 658 N.W.2d 355; Clark v. State, 1999 ND 78, 593 N.W.2d 329. Given the limitations placed upon a federal court's power to consider procedurally-defaulted claims as discussed earlier, Garcia's claim of ineffectiveness during cross-examination of Pat Tendeland should be dismissed with prejudice. See Clemons v. Luebbers 381 F.3d at 750-751.

5. Claim of ineffectiveness during sentencing - (Claim #5)

Garcia argues that his counsel failed to seek out and present mitigating evidence with respect to his troubled childhood and the positive aspects of his character, and that this failure amounted to ineffective assistance. The North Dakota Supreme Court denied this claim essentially holding that Garcia had failed to prove prejudice under the second prong of Strickland. Of all the claims made by Garcia, this is the most problematic.

a. Additional background re sentencing

At the time of sentencing, Garcia's trial counsel made an impassioned argument as to why the trial court should consider a sentence less than the maximum of life imprisonment without the possibility of parole. He emphasized Garcia's youth and the fact that young people are capable of changing. He also made reference to the fact that Garcia's family was present, that they were supportive of him, and that, if called to testify, they would talk about his potential and his positive characteristics. (Doc. # 21, Ex. 15 Sentencing Transcript at 12-20) ["Sentencing Tr."]

Garcia's counsel did not, however, present any other mitigating evidence, nor did he discuss in his argument -at least not in any detail - the mitigating circumstances relating to Garcia's traumatic and chaotic childhood. Id. When asked about this during the post-conviction hearing, Garcia's counsel later testified that the principal reason for not presenting anything in mitigation, other than argument, was his belief it would not do any good given that Garcia was maintaining his innocence and not accepting responsibility for the offense. He also testified that some of the mitigating information was contained in the pre-sentence report and that his recollection (at the time he testified) was that the court had available to it letters from Garcia's family and friends. (Post-Conviction Hearing Tr. at 154-155)

The presentence report, however, contained no letters from Garcia's family and friends - only letters and victim-impact statements from the victims' family and friends urging the court to impose the maximum sentence. Also, it does not appear that any letters from Garcia's family and friends were sent separately to the trial court because the judge outlined during the sentencing hearing what material he had reviewed and no such letters were mentioned. (Sentencing Tr. at 1) Further, the sentencing report contained almost exclusively negative information. The one paragraph of the report that might be characterized as presenting mitigating information made reference to the fact that Garcia had "a history for extreme family chaos and instability" and then touched upon the fact that he had been exposed to criminal activity at an early age, that his mother had been murdered when was he was 12 years old, that his father was currently in prison, and that he had recently been living with his grandmother and his three younger brothers. (Doc. #24)

The fact that little mitigating information was presented during sentencing was commented upon by the North Dakota Supreme Court when it earlier rejected on direct appeal Garcia's argument

that the trial court had an obligation under the Eighth and Fourteenth Amendments to seek out and consider mitigating information before imposing sentence. In response to that argument, the supreme court stated the following:

> [¶58] Here, Garcia was given an opportunity to offer evidence of mitigating circumstances during the presentence investigation and during the sentencing hearing. Garcia and his lawyer offered none.
>
> [¶59] Before imposing sentence, the trial court asked Garcia and his lawyer if there was any legal reason why a sentence should not be imposed at that time. They did nothing. The trial court's frustration is portrayed by its comments before pronouncing Garcia's sentence:
>
> > I came to this case with a personal philosophy. . . . My personal philosophy is that young people are never beyond redemption.
> >
> > My personal philosophy is that particularly young people are capable of changing, they are capable of reforming their lives, that they are capable of starting anew.
> >
> > I came to this case, looking for some reason, some justification, some excuse, to hand down a sentence less than the maximum. Mr. Garcia has given me no alternative, he has given me no opportunity.
>
> The Eighth and Fourteenth Amendments placed no constitutional duty upon the trial court to affirmatively seek out mitigating circumstances before sentencing Garcia when Garcia himself did not offer any.

Garcia I, ¶¶ 58-59.

Following dismissal of his direct appeal, Garcia pursued his claim of ineffective assistance of counsel with respect to the sentencing in his petition for post-conviction relief with the help of new counsel. During this proceeding, Garcia's new counsel developed a record of mitigating evidence that Garcia claimed was available at the time of sentencing and that included a number of

family and friends who would have testified regarding what they believed to be Garcia's positive attributes and his future potential, as wells as additional detail regarding Garcia's chaotic and troubled youth beyond what was included in the presentence report.[16] (Doc. # 31, Ex. B & C; Post-Conviction Hearing Tr. at 85-135)

Following the evidentiary hearing in state district court, the district judge (who was not the sentencing judge) concluded that trial counsel's performance had not been inadequate. The court also concluded that no prejudice had been shown because the sentence would have been the same even if the additional mitigating information had been presented given the heinousness of the offense, Garcia's extensive juvenile record, and the other negative information in the presentence report. (Doc. # 21, Ex. 10)

On appeal to the North Dakota Supreme Court, Garcia's new counsel pointed, in particular, to the remarks of the sentencing judge in which he expressed frustration about the fact that Garcia and his counsel had not provided anything to cause him to give a sentence less than the maximum. According to Garcia's counsel, the mitigating evidence that should have been presented included the following:

> In this case, at least eight witnesses had come forward and offered to give favorable testimony about Garcia's character and background at the sentencing

[16] As an example, Ricardo Lara, a teacher and social worker who had taught Garcia and known him for a number of years, indicated that he was prepared to testify about the positive attributes he saw in Garcia and about Garcia's chaotic and trouble upbringing including: the early years that Garcia spent growing up in a San Antonio housing project where random violence and shooting were common; the murder of Garcia's mother; Lara's belief that Garcia had been physically and emotionally abused by a man who had lived with his mother; Garcia's exposure to alcohol and drugs at an early age by adults who supposedly were to be taking care of him; the imprisonment of Garcia's father; and Garcia being later raised by his grandmother under conditions of absolute poverty. Lara was also prepared to offer an opinion that Garcia's background created emotional distress that had not yet been resolved given Garcia's young age. (Doc. # 31, Ex. B)

> hearing. Garcia's neighbor, Jill Johnson-Danielson, would have testified about her observations of Garcia's caring and positive relationship with his grandmother and brothers. She would also have testified about her personal interaction with Garcia and her observations of his many good qualities. She would have also talked about Garcia's efforts to find a job and his trustworthy and extremely respectful personality. Tr. at 122-23. However, she was told by Garcia's counsel that it did not matter and there was no use testifying. Id. at 119.
>
> Garcia's teachers, Jerry Koenig, Jose Trevino and Ricardo Lara, would have given favorable testimony about his involvement in school and after-school activities. Mr. Lara would also have testified from his background as a social worker about the effects of Garcia's childhood trauma. Jose Trevino would have testified that Garcia was respectful and courteous at school and was good academically and treated his family well. Tr. at 89-90. However, Mr. Trevino asked to met with Garcia's counsel personally and his request was denied. Id. at 88. Garcia's aunts, Celia Escobedo and Andrea Alexander, would have testified about positive aspects of his character as shown by his conduct at home and his behavior toward his grandmother and brothers. They would also have offered facts about his troubled childhood, growing up in poverty and without the support of a stable family. Andrea Alexander personally offered to testify that he was respectful, very loyal, a hard worker in school, and helped around his grandmother's house. Tr. at 131-32. Finally, religion workers Sister Sharon Altendorf and Ralph Huntley would have testified about their experiences with Garcia and their favorable impressions of him even after he was incarcerated. Ralph Huntley would have testified that Barry was not fundamentally malicious, brutal or cruel. Tr. at 104, 109.

(Doc. # 21, Ex. 4 at 36-37)

Garcia's counsel argued that the failure to present some or all of this evidence violated the prevailing norms for professional conduct contained in ABA Standard for Criminal Justice 4-4.1 and cited to a number of federal and state cases, including Wiggins v. Smith, 539 U.S. 510 (2003) and Williams v. Taylor, 529 U.S. 362 (2000), in support of the argument that Garcia's trial counsel's performance was constitutionally deficient. (Id. at 28-38) They concluded their argument as follows:

> Garcia was sixteen years old at the time this crime was committed. During his short life, he had experienced every possible risk factor for criminal conduct, including racial prejudice, poverty, abuse, addicted parents, and a severely dysfunctional family. All of these factors were completely beyond his control. The pre-sentence report included only negative facts about Garcia's personality, and the Court should have been informed that there was another side to his character. Garcia was prejudiced because his trial counsel made no effort to present any evidence whatsoever in mitigation of his sentence.

(Id. at 37-38)

The North Dakota Supreme Court sustained the district court's dismissal of the ineffectiveness-at-sentencing claim on the grounds of lack of prejudice. After distinguishing Wiggins v. Smith, the court stated the following:

> [¶20] Instead, the most relevant portions of Garcia's life history, which he now asserts as mitigating evidence, were presented to the trial court in the presentence investigation report. Garcia claims at least eight witnesses offered to give favorable testimony about his character and background at the sentencing hearing. The potential witnesses' testimony at the post-conviction hearing and their respective affidavits indicate that they would have generally testified that Garcia had a troubled childhood, his mother had been murdered, his father was in prison, he was a good friend and family member, and that he could be repentant and reform himself. The evidence regarding his childhood and family history was presented to the trial court in the presentence investigation report, and a review of the sentencing transcript does not indicate Garcia was prejudiced by the absence of the remaining purported testimony because the trial court was looking for some evidence that Garcia had accepted responsibility for his crime or that he had changed as a result of his experiences. Given the unprovoked, brutal nature of the crimes and Garcia's history of violent crimes and probation violations evidenced in the presentence investigation report, there is no reasonable probability that the purported witness testimony would have changed the sentence imposed. See Strickland,466 U.S. at 700 (stating "at most this evidence shows that numerous people who knew respondent thought he was generally a good person"). Assuming Strickland applies to the sentencing phase of Garcia's trial, we conclude the trial court did not err in finding Garcia was not prejudiced by trial counsel's representation during sentencing.

Garcia II, ¶ 20.

b. Analysis of claim of ineffectiveness at sentencing

The record supports the North Dakota Supreme Court's conclusion that the trial judge placed substantial, if not primary weight, upon the heinousness of the offense in giving the sentence that he did. Garcia's contemporaneous explanation to his associates for the shooting was that Mrs. Tendeland had looked at him the wrong way. During sentencing, the trial judge stated: "[I]t's the most senseless explanation for a murder I have ever heard of." (Sentencing Tr. at 22)

The record also supports the North Dakota Supreme Court's conclusion that Garcia's prior history of violent crime and probation violations was the other substantial factor in the trial court's decision to give the maximum sentence. During sentencing, the trial court summarized Garcia's prior criminal history as follows:

> In reviewing the juvenile history of the defendant, it appears that there are 16 convictions in the past – well, in a period of time from June of 1993 through September 1995. A number of the offenses would have been felonies had they been committed by an adult.
>
> Included in those 16 priors are five assaults or terroristic convictions. The defendant has shown a criminal pattern of increasing violence and consistent violence.

(Id. at 23) Further, he repeatedly expressed his concern that Garcia would commit more violence if given the opportunity because of his explosive personality:

- "His record would indicate that he's the type of individual who is likely to blow at any point." (Id. at 22)
- "This is certainly a set of circumstances that could recur at any point." (Id. at 23)

- "I think that the best evidence would suggest this could recur." (Id. at 24)
- "The defendant's prior history indicates that he's a one-person judicial wrecking crew. He's committed any number of crimes. And I think that there's no reason to believe that he'll refrain from committing crimes in the future." (Id. at 24)

Finally, he concluded that Garcia was unlikely to respond affirmatively to probation or treatment given his past failures in that regard. (Id. at 24)

As for comments of the trial judge that Garcia argues proves prejudice, the North Dakota Supreme Court concluded these remarks were in response to Garcia's failure to acknowledge responsibility for the crime and the wrongfulness of his conduct and not in response to a failure to provide mitigating information generally. Garcia II, ¶ 20 (". . . a review of the sentencing transcript does not indicate that Garcia was prejudiced by the absence of the remaining purported testimony because the trial court was looking for some evidence that Garcia had accepted responsibility for his crime or that he had changed as a result of his experiences.") This is not an unreasonable interpretation. Before imposing sentence, the trial judge commented on all of the specific statutory sentencing factors concluding that most of the factors weighed against Garcia. When he reached the last "catchall" factor, his complete comments were the following:

> The fifteenth factor is other factors. There are a couple of other factors that the Court deems to be significant. The first is Mr. Garcia's youth. All human beings possess certain inalienable attributes. And one of these is the possibility of redemption or rehabilitation. It is possible for a person to undergo, as a result of a life-changing circumstance, youth, spiritual, and personal change. These types of changes are more likely to occur in young people than they are in older people because, in young people, their personalities are still in formation.

However, in order for this to be accomplished, the person must be willing to admit the wrongfulness of their conduct, their powerlessness to change what has already happened, and to express a real willingness to make amends to the fullest extent possible.

In this case, Mr. Garcia has not demonstrated that he understands the seriousness of his crime or that he has changed as a result of his experiences.

I came to this case with a personal philosophy. I think that it's safe to say that every judge, when they take the bench, comes to every case with a personal philosophy. My personal philosophy is that young people are never beyond redemption.

My personal philosophy is that particularly young people are capable of changing, they are capable of reforming their lives, that they are capable of starting anew.

I came to this case, looking for some reason, some justification, some excuse, to hand down a sentence less than the maximum. Mr. Garcia has given me no alternative, he has given me no opportunity.

. . . .

Mr. Garcia, under North Dakota law, a life sentence even without the possibility of parole does not mean that you will sit in prison for the rest of your natural life. You have the opportunity to be pardoned. People have been pardoned in this state for acts far more heinous than this act.

People in this State have been pardoned for murders that are far more brutal, far more inexplicable than this act. But in order for you to be pardoned, you will have to become a new person. In order for you to have the possibility to get out of prison, you will have to change to such an extent that you do not even know the person that you are today.

If I had heard anything from you that indicated to me that you had started this path of change, that you had started the process of change, I might have viewed your lawyer's pleas far more sympathetically. You haven't given me any reason to

believe that you've – that you're in a position to change. I hope you give the Governor a much better chance than you have made here today.

(Sentencing Tr. at 24-27) (Emphasis added)

In Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam) the United States Supreme Court upheld as "objectively reasonable" the California Supreme Court's rejection of a Strickland claim based upon the failure on the part of the habeas petitioner to prove prejudice. In that case, the claim of ineffectiveness was the failure to present mitigating information during sentencing that had to do with the defendant having grown up in a dysfunctional family and being subject to psychological abuse. In rejecting the claim, the California Supreme Court concluded that the aggravating factors of the offense were of such severity that there was no reasonable probability the sentence would have been different if the mitigating information had been presented.

Essentially, the same situation is presented in this case. After careful review, the North Dakota Supreme Court concluded there was no reasonable possibility the sentence would have been less harsh if the additional mitigating evidence had presented given the heinousness of the offense, Garcia's prior record of violent crimes and probation violations, and Garcia's failure to accept responsibility and acknowledge the wrongfulness of his conduct - which the trial judge considered to be a *sine qua non* for rehabilitation. Even if this court would not reach the same conclusion, it cannot be said that the North Dakota Supreme Court's decision on this point is objectively unreasonable.[17]

[17] A closer question that the court need not reach is whether the failure to put on a mitigation case amounted to ineffective assistance given the penalty that Garcia faced, his troubled upbringing, and his juvenile status. Cf. Rompilla v. Beard, 545 U.S. __, 125 S.Ct. 2456 (2005); Roper v. Simmons, 545 U.S. __, 125 S.Ct. 1183 (2005).

B. Claim of denial of right to a public trial - (Claim #6)

Garcia claims that his Sixth Amendment rights were violated when the trial court excluded most of the general public from the courtroom during the testimony of Jamie Guerrero, an important prosecution witness, who was with Garcia on the night of the shooting and who at the time of trial was 15 years of age.

The substance of Guerrero's testimony is set forth in the background section. Essentially, he provided substantial confirming evidence that Garcia was the shooter. On direct appeal, the North Dakota Supreme characterized the exclusion of the general public during the testimony of this one witness as a "partial closure" of the trial.

1. Additional background re claim of denial of public trial

Garcia I recites the facts surrounding the partial closure in detail. Based upon a review of the record, the North Dakota Supreme Court's description of the facts is an accurate and concise representation of what occurred. Consequently, it is set forth in full as follows:

> [¶14] The Tendeland shooting brought on much publicity, and the trial court allowed expanded media coverage of Garcia's jury trial. See NDAdminR 21. At the trial, the State called Jaime Guerrero as a witness. When asked his name, Guerrero replied, "I am not going to say nothing."
>
> [¶15] Away from the jury, the trial court learned Guerrero had not been granted immunity to testify, warned Guerrero he may be subject to contempt penalties, and also informed him of his Fifth Amendment rights to remain silent and to speak to a lawyer. Guerrero asked to speak with a lawyer, and the trial court appointed the same lawyer who was representing Guerrero in juvenile court to advise him. The court recessed, and Guerrero consulted his lawyer during the lunch hour.
>
> [¶16] When the trial court reconvened out of the presence of the jury, Guerrero was still consulting with his lawyer. The State's attorney explained to the court:

> Mr. Guerrero has indicated some willingness to proceed and provide testimony to matters which he has already provided us information.
>
> I'm concerned--and it's been relayed to me--that there may be some concern about the media coverage, particularly the television camera, and also the number of viewers and spectators in the audience of the courtroom.
>
> It is--it's my request at this time that, for the testimony of Jaime Guerrero, that the Court terminate expanded media coverage, terminate the use of the television camera, terminate the feed to the television and/or radio just for that testimony, and that the Court also order that anybody other than the family of Barry Garcia or the family of Cherryl Tendeland be excused from the courtroom, to present--to present a more friendly environment, if you will, for the testimony of this child, who is only 15 years of age.
>
> I think there are good arguments to be made for the termination of the expanded coverage for a person only 15 years of age. There is some reason to believe that he is concerned about other persons' opinions and feelings and actions if he decides to go ahead and testify.
>
> For those reasons, we would like to ask that the media coverage be terminated for Mr. Guerrero and the courtroom be essentially cleared, except for family.

Garcia's attorney resisted the State's request, arguing there was "no compelling reason to shut things down at this point." The court recessed again until Guerrero completed consultation with his lawyer.

[¶17] The trial court reconvened away from the jury with Garcia and his lawyer, Guerrero's lawyer, and the State's attorney. The State's attorney explained he had promised to dismiss with prejudice the juvenile court charges against Guerrero if he testified truthfully in Garcia's trial. Guerrero's lawyer told the court Guerrero "is a juvenile, and he is intimidated by the audience and media coverage," and elaborated on Guerrero's reluctance to testify:

> I think he's intimidated by the whole spectacle of the trial, that he will be on television, he will be in the newspaper again. And it would put him at ease not to have to experience this.

> And he is a juvenile and does want his confidentiality preserved, if possible, but I guess that's not--it's not really possible.
>
> But those are some of the factors that make him not want to testify. This would put him at ease if he didn't have to kind of run the gauntlet to make--before even his testimony.

Garcia's lawyer again objected to any closure of the trial. The State's attorney explained:

> I would like, just for the record, to note that in support of our request and our position, we are aware of another witness, not Mr. Guerrero, but another witness who has indicated a reluctance to provide testimony, who has been subpoenaed, because of actual repercussions that he's already experienced.
>
> So we are basing these requests on some real events, not just speculation. At least that's what I have been told. I have no personal knowledge of it.

The court outlined its "initial thoughts," but recessed and deferred ruling until the media had an opportunity to be heard.

[¶18] After hearing argument from a media representative, the trial court ruled:

> It is the opinion of the Court that in this particular case that it is in the interests of justice to suspend the expanded media coverage order for this witness, and to suspend the rule as regards media coverage.
>
> Exercising the inherent powers of the Court to control the courtroom, I am going to order that the courtroom be cleared, that the feeds to the radio and the television be terminated, and that all persons, except for counsel, Mr. Garcia, and Detective Warren, and the immediate family of--was it--of Mr. Garcia, and the immediate family of Mrs. Tendeland.

> When I say "the immediate family" of Mrs. Tendeland, I mean Pat Tendeland and the two sons. And that's it. And when I say the immediate family of Mr. Garcia, I mean Mr. Garcia's grandmother and Mr. Garcia's brother is present. And I think that's it.
>
> * * * * *
>
> The cautionary instruction I intend to give . . . will read as follows: Ladies and gentlemen of the jury, as you are aware, Mr. Guerrero has indicated an unwillingness to testify. He has expressed a concern about all the media coverage, all of the people--and all the people in the courtroom.
>
> Taking into consideration the youth of Mr. Guerrero and his concerns, the Court has determined that in order to facilitate his testimony, the courtroom will be cleared of all persons. You are not to draw any conclusions or inferences from the clearance of the courtroom.

The court also allowed a single pool representative, chosen by the media, to remain in the courtroom. The court gave the jury the cautionary instruction, and Guerrero testified in the partially closed courtroom.

Garcia I, ¶¶ 14-18.

2. Analysis of claim of denial of public trial

The right to a public trial is guaranteed to criminal defendants under the Sixth Amendment. The First Amendment extends a comparable right to the public and press. Waller v. Georgia, 467 U.S. 39, 44-47 (1984).

The benefits of conducting trials in the open include: helping to insure that criminal defendants are fairly dealt with; encouraging judges, prosecutors, and jurors to act responsibly; encouraging witnesses to come forward and discouraging perjury; and giving the public the opportunity to observe the administration of justice. E.g., Waller, 467 U.S. at 46-47; Gannett Co.,

Inc. v. DePasquale, 443 U.S. 368, 383 (1979). Because of the intangible nature of these benefits, prejudice is presumed in the event of a violation of the public-trial right. Waller, 467 U.S. at 49-50.

However, the public-trial right is not absolute. In Waller v. Georgia, supra, the Supreme Court stated it may give way in "rare" cases to other rights or interests. Id at 45-49. While the Court did not enumerate what all of those situations might be, it adopted the following test for balancing the relevant interests when a court is faced with having to decide whether or not to close a court proceeding

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id at 48.

In this case, Garcia claimed the trial court failed to comply with Waller when it partially closed the proceeding. Specifically, he argued that sufficient reasons and evidence were not advanced for the closure; that alternatives were not properly considered; and that the trial court failed to make adequate findings to support the closure. (Doc. 21, Ex. 2 at 12-15)

On direct appeal, the North Dakota Supreme Court dealt with these claims in the context of both Waller and its prior case of State v. Klem, 438 N.W.2d 798 (N.D. 1989), in which it had overturned a conviction for gross sexual imposition for violation of the public trial right based upon Waller. Citing to a number of federal and state cases, the court distinguished Waller on the grounds that a less stringent, "substantial reason" standard applies to partial closures as opposed to the "overriding standard" set forth in Waller. The court went on to conclude that there were substantial

reasons for partially closing the proceeding while Guerrero testified based upon his juvenile status, his fear of reprisal, and his apparent unwillingness to otherwise testify. Garcia I, at ¶¶ 23-30.

Given the foregoing, this court's inquiry is limited to determining whether the adoption of the lesser, "substantial reason" standard for partial closures, and the application of that standard to the circumstances of this case, are contrary to, or involve an unreasonable application of, clearly established law as determined by the United States Supreme Court. With respect to the adoption of the "substantial reason" test, the facts of this case are indeed different from what the Supreme Court confronted in Waller. In Waller, the court proceeding was completely closed for a significant portion of a suppression-motion hearing that was conducted after the trial began. Also, it is clear from the facts in Waller that the closure went far beyond what was necessary in terms of both time and scope. In this case, the closure was only partial and was strictly limited to the expressed reason for the closure.

Given these differences, the conclusions that Waller is distinguishable, and that a lesser standard can be used for limited partial closures, are reasonable ones. In fact, a number of state and lower federal courts have distinguished Waller on the same basis and have employed the "substantial reason" test to partial closures. E.g., United States v. Jarvis, 236 F.3d 149, 168 n.11 (4th Cir. 2000) (noting the adoption of the test by a number of other circuits without deciding the issue); United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994); Garcia I, at 28 (citing other state and federal cases). While the fact that other courts have reached the same conclusion is normally not dispositive (although it may be persuasive), the Eighth Circuit is one of these courts and its determination that the "substantial reason" test is suitable in cases of partial closure is binding upon this court.

As to the application of the "substantial reason" test to this case, the North Dakota Supreme Court concluded that it is permissible to "exclude members of the public from a trial if a witness will be inhibited or embarrassed to testify in the presence of an audience from this tender age or the nature of his testimony, from actual threats, or from the possibility of reprisals by others if the witness testifies." Garcia I, at ¶ 30. The court cited authority for this proposition, and then concluded that the partial closure was justified Id. Given this reasoned application of the more limited test for partial closure and Garcia's failure to cite to any contrary United States Supreme Court precedent, it cannot be said that the North Dakota Supreme Court's application of the more limited test to the circumstances of this case was objectively unreasonable.

Garcia also complained that the procedures employed by the trial court in making its decision to partially close the trial were constitutionally deficient. Specifically, Garcia complained that the inquiry made by the trial court was insufficient, that the trial court failed to consider alternatives, and the trial court failed to articulate the reasons for the closure. In making these arguments, Garcia has relied primarily upon Waller and the North Dakota Supreme Court's prior application of Waller in Klem.

With regard to the sufficiency of the inquiry and the articulation of the grounds for the partial closure, the North Dakota Supreme Court noted that the trial court "held an in-chambers hearing, two open-court hearings out of the jury's presence, and delayed ruling until the media could also be heard on the request for closure." Garcia I, at ¶ 27. The court further concluded that the "trial court's actions show[ed]. . . careful consideration and weighing of competing interests . . .", (id.) and that the procedure passed constitutional muster. The supreme court did offer one criticism, however. It stated it would have been better if the trial court had obtained Guerrero's reasons for not wanting

to testify in open court from Guerrero, rather than filtered through his attorney and the State's Attorney, and it would have been better if the trial court had more clearly articulated the basis for its decision.

Considering first the sufficiency of the inquiry, the record indicates that the problem first presented itself when Guerrero refused to testify in open court. Both at that point, and also when advising the juvenile as to his rights and appointing counsel, the trial court had the opportunity to judge both the juvenile's demeanor and his sincerity. Then, after appointment of counsel for the juvenile, the trial court had the benefit of appointed counsel's input, as well as that of the State's Attorney, Garcia's counsel, and the media representatives as part of the several hearings that it conducted. At this point, the trial judge was in the best position to determine whether he had sufficient reliable information regarding the juvenile in the face of his obvious reluctance to testify or whether further examination was necessary to make an informed decision.

The North Dakota Supreme Court cited precedent that supports the conclusion that the inquiry in this case was sufficient and that a full evidentiary hearing is not required when the defendant has not requested one. Garcia I, at 27. Moreover, Waller (assuming for the moment it applies) does not dictate any particular form of hearing. Based on this, and Garcia's failure to point to controlling United States Supreme Court precedent to the contrary, it cannot be said that the North Dakota Supreme Court's decision regarding the sufficiency of the inquiry is an unreasonable application of existing federal law as established by the United States Supreme Court.

As for the claimed failure to consider alternatives and to sufficiently articulate reasons for the closure, the record clearly indicates that the trial court allowed the State's Attorney, Guerrero's

counsel, Garcia's counsel, and media representatives to present their different and opposing viewpoints as to what should be done (*i.e.*, alternatives) along with their arguments (*i.e.*, reasons) for their differing viewpoints. (Trial Tr. - Vol. II at 331-356) In addition, at one point in the discussion, the trial court expressed its own preliminary thinking as to what alternative should be followed, when he stated:

> What I am inclined to do is try and minimize the disruption as much as possible by -- let me tell you what my initial thoughts are.
>
> My initial thoughts were -- was to clear the courtroom of everyone except the immediate family of the Garcias. And my initial thought was to order the media not to publish in any fashion any of the testimony that's offered, but not necessarily exclude them from the courtroom. We cut the feed to the camera, you got the radio -- cut the lead to the radio.
>
> The amount of disruption then is just very minimal. Then, you know, as far as the jury is concerned, the only people that would be missing would be all the spectators.

(Trial Tr. - Vol. II at 342) Further, after having made the decision as to who would be allowed to remain in the court room and who would be excluded, the trial court stated it was going to issue a jury instruction that would state:

> The cautionary instruction I intend to give . . . will read as follows: Ladies and gentlemen of the jury, as you are aware, Mr. Guerrero has indicated an unwillingness to testify. He has expressed a concern about all the media coverage, all of the people--and all the people in the courtroom.
>
> Taking into consideration the youth of Mr. Guerrero and his concerns, the Court has determined that in order to facilitate his testimony, the courtroom will be cleared of all persons. You are not to draw any conclusions or inferences from the clearance of the courtroom.

(Trial Tr. - Vol. II at 349-350)(emphasis added) Finally, the context in which the discussions took place cannot be ignored. The problem confronting the court, while an important one, was relatively narrow and simple, and the alternatives were few.

Thus, it is clear from the record that the trial court considered alternatives and ultimately concluded it was necessary to exclude most of the public and the press to facilitate Guerrero's testimony given his age and his other concerns - and so stated on the record without belaboring the obvious. Also, it is clear that the trial court carefully balanced Garcia's, the public's, and the press's rights by not excluding everyone and allowing a limited number of both Garcia's and the victims' family to remain along with a press representative during the limited, partial closure. Consequently, it cannot be said that the North Dakota Supreme Court unreasonably applied Waller when it concluded that the trial court's consideration of alternatives and its articulation of reasons for the partial closure were sufficient. If anything, it may have been overcritical with respect to its suggestion that the record could have been improved upon.

Finally, in concluding there was no constitutional deficiency with respect to the trial court's procedures, the North Dakota Supreme Court assumed that Waller strictly applied even though, from a substantive standpoint, it had employed a lesser standard to judge the propriety of the partial closure. The Eighth Circuit, however, has held with respect to partial closures that "specific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record." Farmer, 32 F.3d at 371. Several other circuits have taken similar positions. E.g., Bowden v. Keane, 237 F.3d 125, 132 (2nd Cir. 2001); United States v. Jarvis, 236 F.3d at 172-173. Likewise, for partial or narrow closures, several circuits have held that the trial judge is not obligated to *sua sponte* consider alternatives that have not been suggested by the parties.

Bowden v. Keane, 237 F.3d at 130-131 (holding not only that there is no obligation, but also that it would be unwise and dangerous for the trial court to suggest alternatives *sua sponte*); Bell v. Jarvis, 236 F.3d at 169-170 (stating "it would be utterly pointless to require the trial judge to conjure up alternative methods of protecting the witness only to reject his own proposals" in a case in which the closure was during the testimony of a single witness for her protection). In this case, these are additional reasons why it cannot be said that the decision of the North Dakota Supreme Court was contrary to, or an unreasonable application of, United States Supreme Court precedent.

C. Claim of denial of fair trial re the street-gang charge - (Claim #7)

In addition to the murder and assault charges, the State also charged Garcia with a street-gang violation under N.D.C.C. § 12.1-06.2-02. However, the State moved to dismiss the charge at the conclusion of its case-in-chief.

Garcia claimed on direct appeal to the North Dakota Supreme Court that this charge violated his due process rights to a fair trial. He argued that the prosecutor, knowing that there was not sufficient evidence to support the charge, brought it for the sole purpose of allowing the State to get before the jury certain street-gang evidence and unfairly prejudice Garcia. Garcia claims the only evidence the prosecution had to support the charge was a statement from Jaime Guerrero to the effect that several of the juveniles that accompanied Garcia were members of the gang, but not Garcia. (Doc. # 21, Ex. 2 at 18-20)

In addressing this claim, the North Dakota Supreme Court first observed that prosecutors have broad discretion in the charging process, but that they must refrain from bringing charges they know are not supported by probably cause. The court went on, however, to reject Garcia's due

process claim for lack of evidence. It stated that Garcia's bald-faced assertions of bad faith were not enough given the fact there was some evidence to support the street-gang charge and the explanation of the State's Attorney that the decision to seek dismissal of the charge at the conclusion of the case-in-chief was based upon tactical considerations related to how the trial had gone and not upon other improper grounds. Garcia I, ¶¶ 42-45.

With respect to the evidence supporting the charge, the supreme court observed that N.D.C.C. § 12.1-06.2-02 does not require that the person charged with a street-gang crime be a gang member. Rather, it is sufficient if the person who is charged acts in one of a variety of ways prohibited by the statute with the intent to promote, further, or assist in the affairs of a criminal gang or to obtain membership in the gang. Id. at ¶ 42. While the supreme court did not explicitly so state, Guerrero's statement, coupled with the other evidence in the case, was more than sufficient to establish probable cause for the street-gang charge.

Based on the foregoing, there is no basis for this court to grant habeas relief. Garcia has not pointed to clear and convincing evidence that would justify overcoming the presumption of correctness as to the state-court finding that there was no bad faith on behalf of the prosecutors. And, absent proof of bad faith, there can be no constitutional violation as alleged because there is nothing inherently wrong with the bringing of the charge. In fact, if a State wants to impose additional penalties for this type of conduct, it is required under the Sixth Amendment to allege the conduct in a charge, or as part of a charge, and allow the jury to make the necessary findings of fact. Apprendi v. New Jersey, 530 U.S. 466 (2000).

D. Claim that Garcia's sentence violates the Constitution - (Claim #8)

Garcia challenges the constitutionality of his sentence of life imprisonment without the possibility of parole. It is not entirely clear from his petition whether he is making one or two claims. However, since the North Dakota Supreme Court considered challenges under both the Cruel and Unusual Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, the petition is construed as encompassing both claims.

Garcia's petition to this court states the following Eighth Amendment claim:

> My conviction violates the constitution of the United States because: my sentence of life without the possibility of parole constitutes cruel and unusual punishment due to there being no statutory standards that served as a meaningful basis when I was given the most severe punishment under North Dakota law.

(Doc. #1) When presenting the same claim to the North Dakota Supreme Court, Garcia's argument more precisely was that the Eighth Amendment requires special statutory guidelines or criteria to distinguish when persons should receive the sentence of life without the possibility of parole, as opposed to a life sentence with the possibility of parole or some lesser sentence.

North Dakota has a statute (N.D.C.C. § 12.1-32-04) that provides a list of authorized, non-binding factors that the trial court can consider with respect to the "desirability of sentencing an offender to imprisonment." Garcia's argument is that the factors set forth in this statute are not sufficient for the ultimate sentence of life imprisonment without parole and that more specific guidance is required, citing to California v. Brown, 479 U.S. 538 (1987) and McClesky v. Kemp, 481 U.S. 279 (1987). While Garcia is vague about what the additional criteria must be, his argument is that the present sentencing scheme allows the court to impose the sentence of life without parole based upon purely arbitrary considerations. According to Garcia, this is what happened in his case.

The North Dakota Supreme Court disposed of Garcia's Eighth Amendment argument by concluding that any requirement for specific and detailed guidance that might apply in death-penalty cases does not apply in non-capital cases based upon the United States Supreme Court's decision in Hamerlin v. Michigan, 501 U.S. 957 (1991). Garcia I, ¶¶ 49-50. In Hamerlin, the Supreme Court upheld a mandatory sentence of life imprisonment without parole for a person convicted of the offense of possessing more than 650 grams of cocaine over the objection that the Eighth Amendment required consideration of mitigating circumstances given the severity of the sentence. The Supreme Court held that its case law requiring individualized sentencing in capital cases does not apply to non-capital cases. 501 U.S. at 994.

After disposing of the argument that the Eighth Amendment does not require special sentencing considerations for the offense of life imprisonment without parole, the North Dakota Supreme Court then reviewed the sentence imposed, along with the factors the trial court considered in passing sentence, and concluded as follows:

> [¶53] A sentence within the minimum and maximum statutory limits is within the discretion of the trial court, and it will not be set aside unless it exceeds the statutory limit or unless the trial court substantially relied on an impermissible sentencing factor. State v. Jacobson, 419 N.W.2d 899, 903 (N.D. 1988). This sentence is within the statutory range, and Garcia has not shown the trial court substantially relied on an impermissible factor in sentencing him. See State v. Manhattan, 453 N.W.2d 758, 760 (N.D. 1990). We conclude Garcia's sentence to life imprisonment without parole is not cruel and unusual punishment within the meaning of the Eighth Amendment.

Garcia I, ¶ 53.

Garcia has not cited to any United States Supreme Court precedent requiring that special sentencing criteria or procedures be employed for sentences of life imprisonment without parole or that otherwise would call into question the sentence imposed in this case on Eighth Amendment

grounds. Consequently, it cannot be said that the North Dakota Supreme Court's rejection of Garcia's Eighth Amendment claim is "contrary to" prior Supreme Court precedent. Likewise, it cannot be said that the decision is an objectively unreasonable application of prior precedent, particularly in light of the Supreme Court's decision in Hamerlin.

In his petition to this court, Garcia also makes reference to the inadequacy of the presentence report and attaches to his petition material that describes a Fourteenth Amendment Due Process challenge. (Doc. #1) Garcia's Due Process claim is that the trial court had an affirmative duty to inquire about mitigating circumstances given the lack of any mention of the same in the presentence report and notwithstanding the failure of Garcia or his counsel to offer much in the way of mitigation at the time of sentencing.

The North Dakota Supreme Court concluded that there was no Due Process violation because (1) Garcia and his counsel were afforded an opportunity to present mitigating information and chose not to do so, and (2) the Constitution does not impose an affirmative duty on a sentencing judge to seek out mitigating information. Garcia I, ¶¶ 54-59.

Garcia has not cited to any United States Supreme Court precedent that is even close to being on point with respect to his Due Process arguments and, as the North Dakota Supreme Court observed, he was given the opportunity to be heard at the time of sentencing with respect to mitigation. Consequently, there is no basis for concluding that the North Dakota Supreme Court's rejection of Garcia's Due Process claim is either "contrary to" or "unreasonable application"of United States Supreme Court precedent.

IV. CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue if the applicant has made a substantial showing of the denial of a constitutional right. When the court has rejected a petitioner's claim on the merits, the substantial showing required is that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also, United States v. Lambros, 404 F.3d 1034, 1036 -1037 (8th Circ. 2005); Garrett v. United States, 211 F.3d 1075, 1076 -1077 (8th Cir. 2000). When the court denies a petitioner's claim on procedural grounds without reaching the merits, the petitioner must demonstrate that reasonable jurists would find it debatable that a valid claim for the denial of constitutional rights has been stated and that the district court was correct in its procedural ruling. Slack, 529 U.S. at 484.

In this case, Garcia has not met his burden with respect to the issuance of a certificate of appealability as to the following claims:

Claim #1	Ineffective assistance of counsel during voir dire.
Claim #3	Ineffective assistance of counsel in failing to sequester prosecution witness, Mr. Tendeland.
Claim #4	Ineffective assistance of counsel in cross-examining Mr. Tendeland.
Claim #7	Violation of right to a fair trial when the prosecution brought a "street gang" charge knowing it did not have sufficient evidence.
Claim #8	The sentence of life imprisonment without the possibility of parole is unconstitutional.

However, the following claims may be debatable and a certificate of appealability is recommended:

Claim #2 Ineffective assistance of counsel in failing to adequately address alleged juror misconduct

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Claim #5 Ineffective assistance of counsel in failing to present mitigating information during sentencing.

Claim #6 Violation of Sixth Amendment public-trial rights.

V. CONCLUSION

Based on the foregoing, an evidentiary hearing is not required under Rule 8 of the Rules Governing Section 2254 Proceedings. Further, Garcia is not entitled to habeas relief and his petition should be denied with prejudice.

Therefore, it is **HEREBY RECOMMENDED** that:

1. Garcia's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Docket No. 1) be **DENIED WITH PREJUDICE**.

2. The court permit an appeal an appeal in forma pauperis from a denial of his petition because such an appeal would not be frivolous.

3. A certificate of appealability be issued with respect to the following claims:

   Claim #2 Ineffective assistance of counsel in failing to adequately address alleged juror misconduct.

.

   Claim #5 Ineffective assistance of counsel in failing to present mitigating information during sentencing.

   Claim #6 Violation of Sixth Amendment public-trial rights.

4. A certificate of appealability be denied with respect to the following claims:

   Claim #1 Ineffective assistance of counsel during voir dire.

   Claim #3 Ineffective assistance of counsel in failing to sequester prosecution witness, Mr. Tendeland.

   Claim #4 Ineffective assistance of counsel in cross-examining Mr. Tendeland.

Claim #7 Violation of right to a fair trial when the prosecution brought a "street gang" charge knowing it did not have sufficient evidence.

Claim #8 The sentence of life imprisonment without the possibility of parole is unconstitutional.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to Local Rule 72.1(3)(4), any party may object to this recommendation within ten (10) days after being served with a copy of this Report and Recommendation. Given the fact that Garcia is incarcerated out-of-state, the court will permit him to file any objections within 20 days after being served with this Report and Recommendation and will also consider any reasonable extension if one is requested.

Dated this __ day of September, 2005.

_____

Charles S. Miller, Jr.
United States Magistrate Judge

APPENDIX "A"

1. Full name _____, Age_____

2. Date of birth_____, Place of birth_____

3. Address_____

   How long at current address _____, How many years in ND _____

4. Highest level of education attained (high school, college, tech school, etc.)

   _____

5. Current occupation (if retired or unemployed, list your last or usual occupation),

   _____

6. Current marital status _____

7. List the names, ages, occupations and relationships of all persons residing with you_____

   _____

8. Have you ever served in the Armed Forces?_____. If so, date of discharge and whether or not discharge was honorable _____

9. List of names, ages, occupations and educational background of your children

   _____

   _____

10. Please list the civic, professional or religious organizations to which you belong, and any offices you hold or have held in these organizations.

_____

_____

11. Have you, or any member of your family ever taken courses in law, criminology, criminal justice, law enforcement, or other law related areas? _____

If yes, list who and what courses _____

_____

12. Have you, a family member or a close personal friend ever worked in or applied for a position in law enforcement, a state's attorney's office or any related law enforcement agency? _____

If so, who and for whom _____

_____

13. Do you know any lawyers, state's attorneys or judges?_____

If so, whom _____

14. Are you, any member of your family or close friends employed by a law enforcement agency (including police, highway patrol, border patrol, FBI, ATF, US Fish & Wildlife Service, ND Game & Fish, Court, US Attorney's Office)? __

If so, list names, positions and relationships to you _____

_____

15. Have you received any training in law or law enforcement? _____

16. Have you, any family member or anyone close to you ever been interviewed by a law enforcement agency? _____

17. Have you or any family member or close personal friend ever had a pleasant or unpleasant experience with law enforcement? _____

If so, explain _____

_____

18. Have you ever served on a jury before?_____

If so, what kind of case (criminal or civil) _____

19. Have you or a family member ever been involved in a lawsuit? _____

If so, were you a Defendant, Plaintiff or Witness _____

20. Have you, a family member or a friend ever been the victim of physical or domestic violence or any other crime? _____

21. Have you or a family member ever been a witness in a criminal action? _____

22. Have you or a family member ever been a witness in a civil action or other legal proceedings? _____

23. Which magazines, newspapers or other periodicals do you regularly read, or subscribe to _____

24. What are your three favorite television shows? _____

_____

25. What are your three favorite books of all time? _____

_____

26. What are the last three books that you read? _____

_____

27. Do you belong to any group or organization that is active in any political matter?

_____

If so, what is the name of the group _____

28. Who is the historical figure (living or dead) whom you most admire?

_____

29. Who is the person who most influenced your life? _____

30. Name the two or three people you most admire:

1. _____

2. _____

3. _____

31. Do you now, or have you ever, had a bumper sticker on your car? _____

If so, what did it say? _____

32. What do you believe the number one problem confronting America is? _____

_____

33. What is the principal cause of crime in America? _____

34. What in your opinion should be done about crime in America? _____

_____

35. Have you or a family member ever been the victim of a crime? _____

If yes, please describe _____

36. Do you have strong feelings about racial minorities? _____

If yes, please describe those feeling _____

_____

37. Do you think a person's race in any manner effects his or her likelihood to commit a criminal act? _____

38. If your answer to question 37 is yes, do you feel that the fact that a person is asian would make him or her more likely or less likely to commit a crime?

_____

39. If your answer to question 37 is yes, do you feel that the fact that the person is black would make him or her more likely or less likely to commit a crime?

_____

40. If your answer to question 37 is yes, do you feel that the fact that a person is hispanic would make him or her more likely or less likely to commit a crime?

_____

41. If your answer to question 37 is yes, do you feel that the fact that a person is native american would make him or her more likely or less likely to commit a crime?_____

42. If your answer to question 37 is yes, do you feel that the fact that a person is white would make him or her more likely or less likely to commit a crime?

_____

43. Have you ever been the victim of racial discrimination? _____

If so, please describe the discrimination _____

_____

44. Recently, there has been a lot of publicity about "street gang" activity. What have you read or heard about this subject? _____

_____

_____

45. Are you familiar with any recent cases in the local area involving allegations of "criminal street gang"activity? _____

If your answer to question 45 is yes, please explain. _____

_____

46. If you were asked to be a juror on any of the cases that you described in answer to question 45, would you be able to set aside the information that you have received outside the court and base a verdict only on the evidence presented in court? _____

47. What do you believe is the main problem confronting our society today?

_____

I swear, under penalty of perjury, that my answers to the above questions are true and correct to the best of my belief.

Signature _____Date _____

EXPLANATION AREA

If you feel that any of the spaces provided were insufficient to answer any particular question, please use this area or explanation. Add additional pages if necessary.